

No. _____

**In The
Supreme Court of the United States**

ALBERT NEDD,

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

Donna Lee Elm
Federal Defender

Adam Labonte, Counsel of Record
Research and Writing Attorney
Fla. Bar No. 115143
Federal Defender's Office
400 North Tampa St., Suite 2700
Tampa, Florida 33602
Telephone: (813) 228-2715
Facsimile: (813) 228-2562
E-Mail: Adam_Labonte@fd.org

QUESTIONS PRESENTED FOR REVIEW

This case presents an important issue concerning the proper application of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e).

Since this Court's decisions in *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis v. United States*, 136 S. Ct. 2243 (2016), which guided courts on the method with which to evaluate a state statute, the Eleventh Circuit has continued to adhere to a flawed prior panel decision holding that a conviction under Florida's aggravated assault statute, Fla. Stat. § 784.021, qualifies as a violent felony under the ACCA's elements clause and similar provisions in the Sentencing Guidelines.

Additionally, this case presents the issue of whether the Eleventh Circuit's rule that reasonable jurists could not debate an issue foreclosed by binding circuit precedent, even where a judge on the original panel subsequently states that the panel's decision may be erroneous, misapplies the standard articulated by this Court in *Miller-El v. Cockrell*, 537 U.S. 322, 336–38 (2003), and more recently in *Buck v. Davis*, 137 S. Ct. 759, 773–74 (2017), for determining whether a movant has made the threshold showing necessary to obtain a certificate of appealability (COA).

Addressing these issues would resolve the Eleventh Circuit's rigid application of its “prior panel precedent rule,” which requires a panel to follow a prior holding even where intervening Supreme Court decisions guide that the prior holding rests on unsound analysis. Additionally, hearing this case would allow correction of the Eleventh Circuit's erroneous application of the COA standard rule, which essentially requires a merits determination and precludes the issuance of COAs, even where reasonable jurists debate whether a movant is entitled to relief.

LIST OF PARTIES

Petitioner, Albert Nedd, was the defendant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the plaintiff in the district court and the appellee in the court of appeals.

TABLE OF CONTENTS

Questions Presented for Review	i
List of Parties.....	ii
Table of Contents	iii
Table of Authorities	v
Petition for a Writ of Certiorari	1
Opinion and Order Below	1
Statement of Jurisdiction	1
Relevant Statutory Provisions	2
Statement of the Case	3
Reasons for Granting the Writ.....	4
A. The holding of <i>Turner v. Warden Coleman FCI (Medium)</i> , 709 F.3d 1328 (11th Cir. 2013), that a Florida aggravated assault conviction is categorically a “violent felony” within the ACCA’s elements clause, should be overruled by this Court because it is inconsistent with prior Eleventh Circuit precedent and with intervening Supreme Court precedent clarifying proper application of the categorical approach.....	4
1. Reasonable jurists can debate whether Florida aggravated assault qualifies as a “violent felony” under the ACCA’s elements clause.....	5
B. The Eleventh Circuit’s rule that a COA may not be granted where binding circuit precedent forecloses a claim erroneously applies the COA standard articulated by this Court in <i>Miller-El</i> and <i>Buck</i>	8
Conclusion	11

TABLE OF CONTENTS – cont’d

Appendix

Decision of the Court of Appeals for the Eleventh Circuit, <i>Albert Nedd v. United States</i> , 17-13289	A-1
Order Dismissing Motion to Vacate, <i>Albert Nedd v. United States</i> , 6:16-cv-1106-Orl-22TBS	A-2

TABLE OF AUTHORITIES

Cases	Pages(s)
<i>Buck v. Davis</i> , 137 S. Ct. 759 (2017)	i, 8, 9
<i>Descamps v. United States</i> , 570 U.S. 254 (2013)	i, 5
<i>DuPree v. State</i> , 310 So. 2d 396 (Fla. 2nd DCA 1975).....	7
<i>Gordon v. Sec’y, Dep’t of Corr.</i> , 479 F.3d 1299 (11th Cir. 2007).....	9
<i>Green v. State</i> , 315 So. 2d 499 (4th DCA 1975)	7
<i>Hamilton v. Sec’y Fla. Dep’t of Corr.</i> , 793 F.3d 1261 (11th Cir. 2015)	8, 9
<i>Johnson v. United States</i> , 135 S. Ct. 2551 (2015).....	1, 3, 5
<i>Kelly v. State</i> , 552 So. 2d 206 (Fla. 5th DCA 1989)	6, 7
<i>LaValley v. State</i> , 633 So. 2d 1126 (Fla. 5th DCA 1995).....	6
<i>Lawrence v. Florida</i> , 421 F.3d 1221 (11th Cir. 2005).....	9
<i>Mathis v. United States</i> , 136 S. Ct. 2243 (2016).....	i, 5, 6, 7
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003)	i, 8, 9
<i>Moncrieffe v. Holder</i> , 133 S. Ct. 1678 (2013)	6
<i>Tompkins v. Sec’y, Dep’t of Corr.</i> , 557 F.3d 1257 (11th Cir. 2009).....	9
<i>Turner v. Warden Coleman FCI (Medium)</i> , 709 F.3d 1328 (11th Cir. 2013)	4, 5, 6, 7
<i>United States v Garcia-Perez</i> , 779 F.3d 278 (5th Cir. 2015)	7
<i>United States v. Golden</i> , 854 F.3d 1256 (11th Cir. 2017).....	4, 5, 6, 7
<i>United States v. Fritts</i> , 841 F.3d 937 (11th Cir. 2016)	4
<i>United States v. Palomino Garcia</i> , 606 F.3d 1317 (11th Cir. 2010)	6

TABLE OF AUTHORITIES – cont’d

Cases	Pages(s)
<i>United States v. Rosales-Bruno</i> , 676 F.3d 1017 (11th Cir. 2012)	7
<i>United States v. Seabrooks</i> , 839 F.3d 1326 (11th Cir. 2016).....	4
<i>United States v. Taylor</i> , 489 F.3d 1112 (11th Cir. 2007), <i>vacated on other grounds</i> , 129 S. Ct. 990 (2009).....	5
<i>Welch v. United States</i> , 136 S. Ct. 1257 (2016).....	8, 9
 United States Sentencing Guidelines	
U.S.S.G. § 2K2.1	5
U.S.S.G. § 4B1.2.....	5
 Statutes	
18 U.S.C. § 922.....	2, 3
18 U.S.C. § 924.....	<i>passim</i>
18 U.S.C. § 3231.....	1
28 U.S.C. § 1254.....	1
28 U.S.C. § 2253.....	8, 9
28 U.S.C. § 2255.....	1, 3, 4
Fla. Stat. § 784.011	3
Fla. Stat. § 784.021	i, 2, 5, 6
 Rules	
S. Ct. Rules, Part III.....	1
S. Ct. Rule 13.1	1

TABLE OF AUTHORITIES – cont’d

Rules	Page(s)
Fed. R. App. P. 35	11
Filings	
Order, <i>In re Jones</i> , No. 16-14106 (11th Cir. June 27, 2016)	10
Order, <i>In re Moore</i> , No. 16-14214 (11th Cir. July 27, 2016)	10
Order Denying Rehearing En Banc, <i>United States v. Golden</i> , No. 15-15624 (11th Cir. March 31, 2017).....	6

PETITION FOR A WRIT OF CERTIORARI

Albert Nedd respectfully petitions this Court for a writ of certiorari to review the Eleventh Circuit Court of Appeals' denial of his motion for a certificate of appealability (COA) on the issue of whether his ACCA sentence, based in part on Florida convictions for aggravated assault, is unconstitutional in light of this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015)(*Samuel Johnson*).

OPINION AND ORDER BELOW

The Eleventh Circuit's denial of Mr. Nedd's motion for a COA in Appeal No. 17-13289 is included in the Appendix at A-1.

STATEMENT OF JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Nedd's criminal case pursuant to 18 U.S.C. § 3231 and jurisdiction over his civil case proceeding pursuant to 28 U.S.C. § 2255. The district court dismissed Mr. Nedd's § 2255 motion on May 21, 2017. Mr. Nedd subsequently filed a notice of appeal on July 20, 2017, and a motion for COA in the Eleventh Circuit on August 7, 2017; the motion for COA was denied on October 24, 2017. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. This petition is timely pursuant to Supreme Court Rule 13.1.

RELEVANT STATUTORY PROVISIONS

This case involves the application of the ACCA, 18 U.S.C. § 924(e). The ACCA's enhanced sentencing provision 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)(1).

In relevant part, the ACCA defines a “violent felony” as:

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

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

18 U.S.C. § 924(e)(2)(B).

The Florida aggravated assault statute provides:

- (1) An “aggravated assault” is an assault:
 - (a) With a deadly weapon without intent to kill; or
 - (b) With an intent to commit a felony.

Fla. Stat. § 784.021.

An assault is defined as “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.” Fla. Stat. § 784.011.

STATEMENT OF THE CASE

Mr. Albert Nedd was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). The presentence investigation report (PSR) recommended sentencing Mr. Nedd as an armed career criminal based, in part, on his prior 1990 Florida convictions for aggravated assault with a weapon and prior 2008 conviction for aggravated assault with a deadly weapon. As an armed career criminal, Mr. Nedd’s enhanced offense level and enhanced criminal history category provided an advisory guideline sentencing range of 180 to 188 months’ imprisonment and a mandatory minimum term of 15 years’ imprisonment. Without the ACCA enhancement, Mr. Nedd’s advisory guideline sentencing range would have been 70 to 87 months’ imprisonment, and the statutory maximum would have been 10 years’ imprisonment. On December 19, 2013, the district court sentenced Mr. Nedd to 180 months’ imprisonment, the statutory mandatory minimum. Mr. Nedd did not appeal.

On June 23, 2016, Mr. Nedd moved to vacate his sentence under 28 U.S.C. § 2255, arguing that his ACCA sentence was unconstitutional based on *Samuel Johnson*, 135 S. Ct. 2551. On May 22, 2017, the district court denied the § 2255 motion and denied a COA. See Appendix A-2. On July 20, 2017, Mr. Nedd filed a timely notice of appeal, and on August 7, 2017, he sought a COA in the Eleventh Circuit. On October 24, 2017, the Eleventh Circuit denied Mr. Nedd’s motion for a

COA, stating that Mr. Nedd had failed to make the requisite showing to merit a certificate of appealability. *See* Appendix A-1.

REASONS FOR GRANTING THE WRIT

- A. The holding of *Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328 (11th Cir. 2013), that a Florida aggravated assault conviction is categorically a “violent felony” within the ACCA’s elements clause, should be overruled by this Court because it is inconsistent with prior Eleventh Circuit precedent and with intervening Supreme Court precedent clarifying proper application of the categorical approach.**

In denying Mr. Nedd’s § 2255 motion, the district court found that his convictions for Florida aggravated assault and Florida robbery qualify as ACCA predicate offenses under the elements clause. Mr. Nedd recognizes that binding Eleventh Circuit precedent holds that aggravated assault categorically qualifies as a “violent felony.” *See United States v. Golden*, 854 F.3d 1256, 1256–57 (11th Cir. 2017); *Turner v. Warden Coleman FCI*, 709 F.3d 1328 (11th Cir. 2013). But, he maintains that those decisions were incorrectly decided and have since been abrogated by this Court’s intervening decisions. As explained below, Florida aggravated assault no longer qualifies as a violent felony under the ACCA’s elements clause.¹

¹ Mr. Nedd also recognizes that his 1995 robbery conviction remains a “violent felony” under recent Eleventh Circuit decisions on the issue. *See United States v. Fritts*, 841 F.3d 937, 943–44 (11th Cir. 2016); *see also United States v. Seabrooks*, 839 F.3d 1326, 1339 (11th Cir. 2016). Mr. Nedd maintains that his 1995 Florida robbery conviction no longer qualifies as a violent felony under the ACCA as those cases were wrongly decided. However, as his ACCA-enhanced status turns on whether his Florida aggravated assault convictions remain violent felonies, he does not address that conviction in this petition or his application for certificate of appealability.

1. Reasonable jurists can debate whether Florida aggravated assault qualifies as a “violent felony” under the ACCA’s elements clause.

Mr. Nedd acknowledges that *Turner* held that aggravated assault, in violation of Fla. Stat. § 784.021, is a violent felony under the ACCA’s elements clause, and the Eleventh Circuit affirmed *Turner*’s binding effect in *Golden*, 854 F.3d at 1257 (Pryor, J., concurring) (per curiam). However, the *Golden* Court noted that although *Turner* dictated that Mr. Golden’s § 2K2.1(a)(2) enhancement² based on aggravated assault must be upheld, “some members of our court have questioned the continuing validity of *Turner* in light of cases like *Descamps v. United States*, 133 S. Ct. 2276 (2013).” *Id.* Indeed, after *Johnson*, the *Golden* Court ordered supplemental briefing and held oral argument on the effect of post-*Turner* Supreme Court precedent on *Turner*’s continued viability.³ And perhaps the most compelling

² Section 2K2.1(a)(2) provides for an increased offense level based on prior convictions for a “crime of violence” or “controlled substance offense,” incorporating the definitions of both terms from § 4B1.2. See § 2K2.1(a)(2), comment. (n.1). Because the elements clauses in the ACCA and § 4B1.2 are identical, “cases interpreting ‘crime of violence’ under § 4B1.2 provide important guidance in determining what is a ‘violent felony’ under the ACCA” *United States v. Taylor*, 489 F.3d 1112, 1113 (11th Cir. 2007), *vacated on other grounds*, 129 S. Ct. 990 (2009). Compare 18 U.S.C. § 924(e)(2)(B)(i), with USSG § 4B1.2(a)(1).

³ Specifically, the *Golden* Court ordered supplemental briefing on the following questions:

1. In *Descamps v. United States*, the Supreme Court declined to address “whether, in determining a crime’s elements [for purposes of the Armed Career Criminal Act (“ACCA”)], a sentencing court should take account not only of the relevant statute’s text, but of judicial rulings interpreting it.” 133 S. Ct. 2276, 2291 (2013). How did the Supreme Court’s decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016), answer or inform this open question?

evidence that reasonable jurists can debate whether aggravated assault meets the elements clause in light of such precedent is the well-reasoned concurring opinion in *Golden*, which urged the Eleventh Circuit to revisit *Turner* by rehearing *Golden* en banc. *Id.* However, Mr. Golden’s petition for rehearing en banc was denied. See Order Denying Rehearing En Banc, *United States v. Golden*, No. 15-15624 (11th Cir. March 31, 2017).

Golden’s concurring opinion explains that *Turner* was incorrectly decided because it failed to consider the least of the acts criminalized by the aggravated assault statute. 854 F.3d at 1258; see *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013). Although the *Turner* Court applied a categorical approach, that court assumed the aggravated assault statute requires an *intentional* act—the mens rea required by the elements clause—without consulting Florida case law. *Golden*, 854 F.3d at 1258 (citing *United States v. Palomino Garcia*, 606 F.3d 1317, 1334–36 (11th Cir. 2010)). Review of Florida case law would have revealed that aggravated assault may be committed with a *mens rea* of “culpable negligence,” which is akin to recklessness. *Id.* (citing *LaValley v. State*, 633 So. 2d 1126 (Fla. 5th DCA 1995); *Kelly v. State*, 552

-
2. Did *Mathis*’s consideration of state court rulings affect the validity of this Court’s decision in *Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328 (11th Cir. 2013), in which we held that Florida’s aggravated assault statute, Fla. Stat. § 784.021, categorically qualifies as a “crime of violence” under ACCA without considering Florida state court decisions interpreting that crime as including acts of culpable negligence?
 3. Has Supreme Court precedent post-*Turner* affected in any other way *Turner*’s holding that Florida aggravated assault qualifies as a violent felony?

So. 2d 206 (Fla. 5th DCA 1989)); *see also Green v. State*, 315 So. 2d 499 (4th DCA 1975); *DuPree v. State*, 310 So. 2d 396 (Fla. 2nd DCA 1975); *see generally United States v. Garcia-Perez*, 779 F.3d 278, 285 (5th Cir. 2015) (equating Florida’s “culpable negligence” standard with “recklessness”). As held by *United States v. Rosales-Bruno*, 676 F.3d 1017 (11th Cir. 2012), and confirmed by *Mathis v. United States*, 136 S. Ct. 2243 (2016), the Eleventh Circuit is bound by Florida courts’ rulings on substantive elements of a state offense in determining whether the offense qualifies as a violent felony. *Id.* at 1259–60. The *Golden* concurrence thus concludes:

Had *Turner* looked to the elements of aggravated assault under Florida law as interpreted by Florida courts, **it would have been clear that the offense cannot qualify as a violent felony under the elements clause** because a conviction can be obtained where the defendant merely was reckless . . . **Circuit law should not compel district courts to continue applying *Turner* now that the Supreme Court has revealed the error of *Turner*’s approach.** Although I am bound to concur in the judgment in this case, I believe we as a full court should use [this case] as an opportunity to overrule *Turner* and square our precedent with our own earlier precedents, Florida law, and the Supreme Court’s recent decisions.

Id. at 1260 (emphasis added).

Although the Eleventh Circuit denied Mr. Golden’s petition for rehearing, it is clear that at least one member of that court believes that Florida aggravated assault does not qualify as a violent felony under the elements clause. Therefore, reasonable jurists can at least debate whether Mr. Nedd’s aggravated assault convictions continue to qualify as ACCA predicate offenses and accordingly, whether he was erroneously sentenced above the statutory maximum. For this reason, Mr.

Nedd is entitled to a COA in this case. *See Welch v. United States*, 136 S. Ct. 1257, 1263–64 (2016) (citing *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003)).

B. The Eleventh Circuit’s rule that a COA may not be granted where binding circuit precedent forecloses a claim erroneously applies the COA standard articulated by this Court in *Miller-El* and *Buck*.

To obtain a COA, a movant must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “Until a prisoner secures a COA, the Court of Appeals may not rule on the merits of his case.” *Buck v. Davis*, 137 S. Ct. 759, 773–74 (2017) (citing *Miller-El*, 537 U.S. at 336). “At the COA stage, the only question is whether the applicant has shown that ‘jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.’” *Id.* (quoting *Miller-El*, 537 U.S. at 327). “This threshold question should be decided without ‘full consideration of the factual or legal bases adduced in support of the claims.’” *Id.* (quoting *Miller-El*, 537 U.S. at 336). “When a court of appeals side steps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.” *Id.* (quoting *Miller-El*, 537 U.S. at 336–37).

The Eleventh Circuit has adopted a rule requiring that COAs be adjudicated on the merits. Under the Eleventh Circuit’s rule, COAs may not be granted where binding circuit precedent forecloses a claim. *See Hamilton v. Sec’y Fla. Dep’t of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (“[R]easonable jurists will follow controlling

law.”); *see also* *Tompkins v. Sec’y, Dep’t of Corr.*, 557 F.3d 1257, 1261 (11th Cir. 2009); *Gordon v. Sec’y, Dep’t of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007); *Lawrence v. Florida*, 421 F.3d 1221, 1225 (11th Cir. 2005). To be sure, the Court phrased its decision in Mr. Nedd’s case using the proper terms—that reasonable jurists would not debate whether Mr. Nedd is entitled to relief—but reached its conclusion by essentially deciding the case on the merits, that he would be unsuccessful on appeal because *Hines* and *Sams* are binding circuit precedent. *Buck*, 137 S. Ct. at 773. The Eleventh Circuit’s rule places too heavy a burden on movants at the COA stage. As this Court recently stated in *Buck*:

[W]hen a court of appeals properly applies the COA standard and determines that a prisoner’s claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the [Eleventh] Circuit here) inverts the statutory order of operations and “first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits,” it has placed too heavy a burden on the prisoner *at the COA stage*. *Miller-El*, 537 U.S., at 336–337, 123 S. Ct. 1029. *Miller-El* flatly prohibits such a departure from the procedure prescribed by § 2253.

Id. at 774.

Indeed, as this Court stated in *Miller-El*, “[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.” 537 U.S. at 338. A COA should be denied only where the district court’s conclusion is “beyond all debate.” *Welch*, 136 S. Ct. at 1264. Here, we know that the conclusion is not

“beyond all debate,” particularly because a member of the Eleventh Circuit has written that the issue is debatable. *In re Jones*, No. 16-14106, Order at 13 (11th Cir. June 27, 2016)(Martin, J. concurring); *In re Moore*, No. 16-14214, Order at 4–9 (11th Cir. July 27, 2016)(Martin, J., concurring). Because the Eleventh Circuit’s rule essentially requires a merits determination, and precludes the issuance of COAs where reasonable jurists debate whether a movant is entitled to relief, Mr. Nedd respectfully requests that this Court grant this petition to review the Eleventh Circuit’s erroneous application of the COA standard.

CONCLUSION

If Albert Nedd's prior aggravated assault convictions do not qualify as "violent felonies" under the ACCA's elements clause for any of the reasons raised herein, he was ineligible for enhanced sentencing under the ACCA. Furthermore, this case addresses the Eleventh Circuit's erroneous application of the COA standard, which adopts a rule that a COA be adjudicated on the merits.

This is an excellent case for certiorari for these reasons. If granted a COA, Mr. Nedd can seek to appeal en banc in the Eleventh Circuit Court of Appeals pursuant to Fed. R. App. P. 35. The Court should grant the writ of certiorari in this case.

Respectfully submitted,

Donna Lee Elm
Federal Defender



Adam Labonte, Counsel of Record
Research and Writing Attorney
Fla. Bar No. 115143
Federal Defender's Office
400 North Tampa St., Suite 2700
Tampa, Florida 33602
Telephone: (813) 228-2715
Facsimile: (813) 228-2562
E-Mail: Adam_Labonte@fd.org
Counsel of Record for Petitioner

Appendix A-1

Decision of the Court of Appeals
for the Eleventh Circuit

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

October 24, 2017

Elizabeth Warren
U.S. District Court
401 W CENTRAL BLVD
ORLANDO, FL 32801

Appeal Number: 17-13289-D
Case Style: Albert Nedd v. USA
District Court Docket No: 6:16-cv-01106-ACC-TBS
Secondary Case Number: 6:13-cr-00154-ACC-TBS-1

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Scott O'Neal, D
Phone #: (404) 335-6189

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13289-D

ALBERT NEDD,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Albert Nedd's motion for a certificate of appealability is DENIED because he has failed to show that reasonable jurists would find debatable both (1) the merits of an underlying claim and (2) the procedural issues he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

/s/ Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE

Appendix A-2

Order Dismissing Motion to Vacate

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ALBERT NEDD,

Petitioner,

v.

Case No: 6:16-cv-1106-Orl-22TBS
(6:13-cr-154-Orl-22TBS)

UNITED STATES OF AMERICA,

Respondent.

_____ /

ORDER

This cause is before the Court on the Motion to Vacate, Set Aside, or Correct Sentence (“Motion to Vacate,” Doc. 1) filed by Petitioner pursuant to 28 U.S.C. § 2255. Petitioner also filed a Memorandum of Law (Doc. 5) in support of the Motion to Vacate. The Government filed an Amended Response (Doc. 10) in opposition to the Motion to Vacate. Petitioner filed a Reply (Doc. 17) to the Amended Response. For the reasons set forth herein, the Motion to Vacate is denied.

I. PROCEDURAL BACKGROUND

A Grand Jury charged Petitioner by Indictment with possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). (Criminal Case 6:13-cr-154-Orl-22TBS, Doc. 1).¹ Petitioner subsequently entered into a Plea Agreement (Criminal Case Doc. 41) in which he agreed to enter a plea of guilty to the charge.

¹ Criminal Case No. 6:13-cr-154-Orl-22TBS will be referred to as “Criminal Case.”

Petitioner entered his plea before Magistrate Judge Thomas B. Smith, who filed a Report and Recommendation Concerning Plea of Guilty (Criminal Case Doc. 38) recommending that the Plea Agreement and the guilty plea be accepted and that Petitioner be adjudged guilty and have sentence imposed accordingly.

The Court then entered an Acceptance of Plea of Guilty and Adjudication of Guilt (Criminal Case Doc. 44) in which the guilty plea was accepted and Petitioner was adjudicated guilty of the offense. The Court next entered a Judgment in a Criminal Case (Criminal Case Doc. 48) in which Petitioner was sentenced to imprisonment for a term of 180 months, to be followed by supervised release for a total term of 3 years. Petitioner did not file a direct appeal.

II. ANALYSIS

Petitioner argues that, pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015), his sentence is unconstitutional because his prior State of Florida conviction for aggravated assault “no longer qualifies as a ‘violent felony’” (Doc. 5 at 3).² In *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Supreme Court held that the residual clause of the Armed Career Criminal Act’s (“ACCA”), 18 U.S.C. § 924(e), is unconstitutionally vague. *Id.* at 2557–58, 2563. The *Johnson* decision was made

² Under the Presentence Investigation Report (“PSI”), Petitioner qualified under the ACCA due to his three convictions for aggravated assault, one conviction for robbery, and one conviction for resisting arrest with violence. (Criminal Case Doc. 45 at 6).

retroactive on collateral review by the Supreme Court in *Welch v. United States*, 136 S. Ct. 1257 (2016).

Since Petitioner did not file a direct appeal, this claim was not raised with the Eleventh Circuit Court of Appeals. “As a general rule, a criminal defendant who fails to object at trial or to raise an issue on direct appeal is procedurally barred from raising the claim in a section 2255 motion absent a showing of cause for failing to preserve the claim and actual prejudice from the alleged error.” *Orso v. United States*, 452 F. App’x 912, 914 (11th Cir. 2012). In the alternative, “the merits of a procedurally defaulted claim may be reached, in very narrowly defined circumstances, if failure to address the claim would result in a ‘fundamental miscarriage of justice.’” *Id.* Actual innocence of the offense may be shown to satisfy the fundamental miscarriage of justice standard. *Id.*

In the present case, Petitioner is procedurally barred from raising his claim because it was not raised on direct appeal. However, Petitioner argues that the *Johnson* decision constitutes a basis to overcome the procedural bar.

The Court rejects Petitioner’s argument. In *United States v. Golden*, No. 15-15624, 2017 WL 343523, (11th Cir. Jan. 24, 2017), the Eleventh Circuit Court of Appeals held that it was bound under the prior panel precedent rule to find that Florida aggravated assault qualified as a “crime of violence” under the elements clause. Petitioner

acknowledges the ruling in *Golden*,³ and the Court rejects Petitioner's request to enter a ruling contrary to *Golden*.

As a result, Petitioner still has at least three ACCA-qualifying convictions,⁴ and the *Johnson* decision does not provide a basis to overcome the procedural bar. Petitioner does not demonstrate that his procedurally barred claim should be considered under the actual innocence and fundamental miscarriage of justice standard. Further, the entire record has been reviewed, and the Court concludes that Petitioner is unable to satisfy the exceptions to the procedural bar. Accordingly, Petitioner's claim is procedurally barred, and the Motion to Vacate is denied.⁵

III. CERTIFICATE OF APPEALABILITY

This Court should grant an application for a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also *Lamarca v. Sec'y*,

³ Doc. 17 at 4.

⁴ Petitioner "recognizes that his 1994 robbery conviction remains a 'violent felony' under recent Eleventh Circuit decisions on the issue." (Doc. 17 at 5). However, according to Petitioner, the decision of the Eleventh Circuit of Appeals in *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016) "was wrongly decided," and his 1994 robbery conviction no longer qualifies as a crime of violence. (*Id.* 5-6). The Court rejects Petitioner's argument.

⁵ Further, as discussed, Petitioner's claim is without merit.

Dep't of Corr., 568 F.3d 929, 934 (11th Cir. 2009). However, the petitioner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

Petitioner fails to demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Moreover, Petitioner cannot show that jurists of reason would find this Court's procedural rulings debatable. Petitioner fails to make a substantial showing of the denial of a constitutional right. Thus, the Court will deny Petitioner a certificate of appealability.

IV. CONCLUSION

Accordingly, it is **ORDERED** and **ADJUDGED** as follows:

1. The Motion to Vacate, Set Aside, or Correct Sentence (Doc. 1) is **DENIED**.
2. This case is **DISMISSED with prejudice**.
3. Petitioner is **DENIED** a certificate of appealability.
4. The Clerk of the Court is directed to enter judgment in favor of Respondent and to close this case. A copy of this Order and the judgment shall also be filed in criminal case number 6:13-cr-154-Orl-22TBS.
5. The Clerk of the Court is directed to terminate the section 2255 motion (Criminal Case Doc. 56) filed in criminal case number 6:13-cr-154-Orl-22TBS.

DONE and **ORDERED** in Orlando, Florida on May 21, 2017.


ANNE C. CONWAY
United States District Judge

Copies furnished to:

Counsel of Record
OrlP-2 5/21