

Appendix A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12428-B

ERIC LONDREY GRIFFIN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Eric Griffin, a federal prisoner, was convicted by a jury, in October 2000, of three counts of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g) and § 924(e). He was sentenced as an armed career criminal to 295 months' imprisonment for each count, to be served concurrently, followed by a 5-year term of supervised release. Judgment was issued in his case on January 3, 2001. Griffin appealed his convictions and sentences, and this Court affirmed on November 16, 2001. *United States v. Griffin*, 277 F.3d 1378 (11th Cir. 2001).

I. Presentence Investigation Report

As background, Griffin's presentence investigation report ("PSI") indicated that he was previously convicted in Florida of the following: delivery of cocaine, in 1989; battery on a

correctional officer, in 1990; assault or battery within a county detention facility, in 1992; and aggravated assault with a deadly weapon, in 1996.¹

II. 28 U.S.C. § 2255 Motion Filed in 2007

Griffin filed his first 28 U.S.C. § 2255 motion to vacate in January 2007, arguing ineffective assistance of counsel and that his Armed Career Criminal Act (“ACCA”) sentence enhancement was unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000).² The district court dismissed the § 2255 motion as time-barred. Griffin then filed a second § 2255 motion in October 2014, arguing that, pursuant to *Descamps v. United States*, 133 S. Ct. 2276 (2013), his predicate convictions used to enhance his sentence lacked *mens rea* elements. The district court dismissed the motion for lack of jurisdiction, because Griffin did not seek authorization from this Court prior to filing.

III. Application to File a Successive 28 U.S.C. § 2255 Motion in 2016

On April 28, 2016, Griffin, through counsel, sought authorization from this Court for leave to file a successive § 2255 motion, arguing that, pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2016), his sentence was unconstitutionally enhanced under the ACCA. This Court determined that Griffin presented a *prima facie* case for his successive § 2255 motion. In granting authorization, this Court determined that Griffin’s 1989 Florida conviction for delivery of cocaine potentially was a serious drug offense under the ACCA. *See United States v. Smith*,

¹ The PSI indicated that Griffin had additional prior convictions, but they are not relevant to the analysis of the current authorized, successive § 2255 motion. Griffin acknowledged, in the instant motion, that the district court relied upon these named prior convictions as predicate offenses to enhance his sentence under the Armed Career Criminal Act.

² In *Apprendi*, the Supreme Court held that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490.

775 F.3d 1262, 1268 (11th Cir. 2014) (holding that convictions under Fla. Stat. § 893.13(1), for sale and possession of cocaine with intent to distribute, are serious drug offenses under the ACCA). This Court also determined that Griffin's Florida 1996 conviction for aggravated assault with a deadly weapon appeared to qualify as a violent felony under the ACCA. *See Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1228, 1341 (11th Cir. 2013), *abrogated on other grounds as recognized in United States v. Hill*, 799 F.3d 1318 (11th Cir. 2015). This Court noted, however, that it was unclear whether Griffin's 1990 conviction for battery on a correctional officer and 1992 conviction for assault or battery within a county detention facility qualified as crimes of violence under § 924(e).

IV. Proceedings in the District Court on Griffin's Successive 28 U.S.C. § 2255 Motion

Griffin filed the instant counseled, authorized, successive § 2255 motion in July 2016. He acknowledged that his 1989 conviction for delivery of cocaine and his 1996 aggravated assault with a deadly weapon still qualified as predicate offenses to enhance his sentence under the ACCA. He argued, however, that his 1990 conviction for battery on a correctional officer and his 1992 conviction for assault or battery within a county detention facility did not fall under the enumerated offenses or elements clause of the ACCA. As such, he maintained that he no longer qualified as an armed career criminal.

The government responded that *Johnson* afforded Griffin no relief, because none of the four convictions that he complained of qualified as violent felonies under the ACCA's residual clause. The government noted that Griffin conceded that his 1989 conviction for delivery of cocaine and his 1996 conviction for aggravated assault with a deadly weapon still qualified as predicate offenses. Thus, the government maintained, if one additional conviction qualified as a predicate offense, his sentence was valid.

The government attached certified copies of the charging document, plea hearing minutes, and judgment for what had been referred to in the PSI and successive § 2255 proceedings thus far as Griffin's 1992 conviction for assault or battery within a county detention facility. The documents indicated that Griffin was actually convicted, in 1992, of attempted assault or battery within a county detention facility, in violation of Fla. Stat. § 951.075 (1992), a second degree felony. The government maintained that this 1992 conviction for attempted assault or battery within a county detention facility qualified under the use of force clause, because Fla. Stat. § 951.075 required that the defendant commit an assault upon another person with a deadly weapon or by any "means of force likely to produce great bodily injury." See Fla. Stat. § 951.075 (1992). The government asserted that, because Griffin had three predicate offenses—1989 delivery of cocaine, 1996 aggravated assault with a deadly weapon, and 1992 attempted assault or battery within a county detention facility—it was not necessary to determine if his 1990 conviction for battery on a correctional officer qualified as a predicate offense to enhance his sentence under the ACCA.

Griffin replied, acknowledging that his 1992 conviction for attempted assault or battery within a county detention facility was a violation of Fla. Stat. § 951.075, and not Fla. Stat. § 784.082, as he previously had asserted. He maintained, however, that Florida battery and assault offenses universally were not violent felonies under the elements clause of § 924(e), because they could be established by mere recklessness. Although he had conceded in his successive § 2255 motion that his 1996 aggravated assault with a deadly weapon conviction qualified as a violent felony, Griffin argued, for the first time in his reply, that the conviction was not a proper predicate offense to enhance his sentence post-*Johnson*. Griffin contended that

Turner was not binding precedent, because the opinion failed to include any analysis of the intent component of Florida's aggravated assault statute.

In January 2017, the government filed a notice of supplemental authority, namely, this Court's recently published opinion in *United States v. Golden*, 854 F.3d 1256, 1257 (11th Cir. 2017), which held that Fla. Stat. § 784.021, aggravated assault, qualified as a crime of violence under U.S.S.G. § 4B1.2(a)(1)'s elements clause. The government maintained that § 4B1.2's elements clause was identical to the elements clause of the ACCA, and cited *Turner*'s holding, that Florida aggravated assault qualified as a crime of violence, as binding precedent. *Id.*

In April 2017, a magistrate judge issued a report and recommendation ("R&R") that recommended denying the § 2255 motion and a certificate of appealability ("COA"). The R&R noted that, because Griffin's 1989 conviction for delivery of cocaine undisputedly qualified as an ACCA predicate offense, he needed only two additional qualifying convictions in order for his sentence to have been properly enhanced under the ACCA.

The R&R concluded that Griffin's 1992 second degree felony conviction for attempted assault or battery in a county detention facility qualified under § 924(e)'s elements clause. Specifically, the R&R found that the language from Fla. Stat. § 951.075, indicating that the offense is committed when a detainee commits assault and/or battery upon another "with a deadly weapon or instrument by any means of force likely to produce great bodily injury," required as an element the use, attempted use, or threatened use of physical force.³

The R&R also determined that Griffin's 1996 conviction for aggravated assault with a deadly weapon qualified as a predicate offense to enhance his sentence under the ACCA, noting that this Court had held, on more than one occasion, that the offense satisfies the elements clause

³ This statute was repealed in 1996.

of § 924(e). As such, the R&R concluded that Griffin had three requisite convictions to support his ACCA enhancement, and he was not entitled to relief.

Griffin objected to the R&R, arguing that his 1992 conviction for attempted assault or battery within a county detention facility did not qualify as a crime of violence because it could be accomplished by mere touching. He also re-asserted that his 1996 aggravated assault with a deadly weapon conviction was not a violent felony, because *Turner*, a pre-*Johnson* case, was not binding precedent. In May 2017, the district court entered an order that adopted the R&R and denied the § 2255 motion and a COA.

II. COA from This Court

Griffin now seeks a COA from this Court. In his counseled motion for a COA, Griffin re-asserts his argument that *Turner*, in holding that Florida aggravated assault qualifies as a violent felony under § 924(e), was incorrectly decided, because the offense can be committed through recklessness. He maintains that his 1992 conviction for attempted assault or battery within a county detention facility, under Fla. Stat. § 951.075, did not constitute a violent felony, because it could be committed through mere negligence.

To obtain a COA, a petitioner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). Where the district court has denied a habeas petition on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

A convicted felon who knowingly possesses a firearm is subject to a prison term of no more than ten years. 18 U.S.C. §§ 922(g), 924(a)(2). The ACCA provides, however, that, if a convicted felon in possession of a firearm has 3 prior convictions for a violent felony or a serious

drug offense that were committed on occasions different from one another, then he is subject to a mandatory 15-year minimum sentence. 18 U.S.C. § 924(e)(1). The ACCA defines the term “violent felony” as any crime, punishable by a term of imprisonment 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 first prong of the latter definition is sometimes referred to as the “elements clause,” while the second prong contains the “enumerated crimes” and, finally, what is commonly called the “residual clause.” *United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012).

On June 26, 2015, the Supreme Court, in *Johnson*, held that the residual clause of the ACCA was unconstitutionally vague because it created uncertainty about how to evaluate the risks posed by a crime and how much risk was required to qualify as a violent felony. *Johnson*, 135 S. Ct. at 2557-58, 2563. The Court clarified that, in holding that the residual clause was void, it did not call into question the application of the elements clause and the enumerated crimes of the ACCA’s definition of a violent felony. *Id.* at 2563.

Griffin has not shown that reasonable jurists would debate the district court’s conclusion that his sentence was properly enhanced as an armed career criminal based upon three predicate Florida convictions: his 1989 conviction for delivery of cocaine; his 1992 conviction for attempted assault or battery in a county detention facility; and his 1996 conviction for aggravated assault with a deadly weapon. Griffin does not contest that his 1989 conviction for delivery of cocaine qualifies as an ACCA predicate offense. He maintains, however, that his other two convictions do not qualify as violent felonies under the elements clause of § 924(e).

The district court correctly concluded that Griffin's 1996 Florida conviction for aggravated assault with a deadly weapon qualifies as a violent felony under the ACCA post-*Johnson*. This Court held, in *Turner*, that Florida aggravated assault qualified as a violent felony under the elements clause of § 924(e). *Turner*, 709 F.3d at 1338. After the *Johnson* decision was announced, this Court again cited to *Turner* as binding precedent that the offense has as an element the use, attempted use, or threatened use of physical force against the person of another. *See Golden*, 854 F.3d at 1257. As such, Griffin's argument is foreclosed by Circuit precedent.

Reasonable jurists also would not debate the district court's conclusion that Griffin's 1992 conviction for attempted assault or battery within a county detention facility qualified under the ACCA's elements clause. At the time of Griffin's conviction, Fla. Stat. § 951.075 provided as follows:

Every person being detained or undergoing a sentence in a county or municipal jail or detention facility who commits assault, battery, or assault and battery upon the person of another *with a deadly weapon or instrument or by any means of force likely to produce great bodily injury*, but which is not an assault with intent to commit a felony, shall be guilty of a felony of the second degree.

Fla. Stat. § 951.075 (1992) (emphasis added).

As the Supreme Court has noted, in the context of a statutory definition of violent felony, the phrase "physical force" means violent force—that is, force capable of causing physical pain or injury to another person. *Johnson v. United States*, 559 U.S. 133, 140 (2010) ("*Curtis Johnson*"). In *Curtis Johnson*, the Supreme Court held that Florida simple battery, which requires a defendant "actually and intentionally touches or strikes another person against the will of another," does not satisfy the ACCA's elements clause. *Id.* at 145; *see* Fla. Stat. § 784.03(1)(a)(1). The Supreme Court based its holding on the fact that the actual and intentional touching—which was the only element necessary to support a conviction for simple

battery—was satisfied by any physical contact, no matter how slight. *Curtis Johnson*, 559 U.S. at 138 (noting that a conviction could be sustained by a tap on the shoulder).

The statute of Griffin's conviction is dissimilar to Florida's simple battery statute analyzed in *Curtis Johnson*, and more similar to Florida's felony battery statute, found to require the use of violent force in *United States v. Vail-Bailon*, 868 F.3d 1293 (11th Cir. 2017).⁴ Florida's felony battery statute requires a defendant "actually and intentionally touches or strikes another person against the will of the other, and causes great bodily harm, permanent disability, or permanent disfigurement." Fla. Stat. § 784.041. In *Vail-Bailon* this Court noted that, under Florida law, "great bodily harm" excludes minor injuries and mere bruises, and requires the defendant inflict severe physical injury on the victim. *See Vail-Bailon*, 868 F.3d at 1303. "[G]reat bodily injury," which would seem to require at least the same amount of force as great bodily harm, is an element of Griffin's offense. *See* Fla. Stat. § 951.075. As such, Griffin's 1992 conviction for attempted assault or battery within a county detention facility satisfied § 924(e)'s element's clause, because Florida law required that he attempted to inflict severe physical injury on his victim or attempted the use of a deadly weapon. *See id.; Vail-Bailon*, 868 F.3d at 1303.

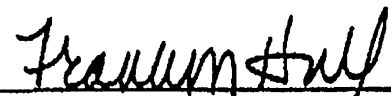
Analyzing Florida assault under the ACCA, this Court held in *Turner* that a statute requiring "an intentional, unlawful threat by word or act to do violence," satisfied § 924(e)'s elements clause because it required the threatened use of physical force against another. *Turner*, 709 F.3d 1328. The language of § 951.075, requiring "a deadly weapon or instrument or . . . any

⁴ *Vail-Bailon* concerned whether Florida felony battery qualified as a crime of violence under U.S.S.G. § 2L1.2(b)(1)(A)(ii), which provided a 16-level enhancement for a defendant previously deported after being convicted of a felony that was a crime of violence, and the decision did not address whether Florida felony battery qualified as a crime of violence under the ACCA. *See Vail-Bailon*, 868 F.3d at 129-96. However, the decision utilized the definition of "physical force" and analysis from *Curtis Johnson*, 559 U.S. at 133, which was an ACCA case.

means of force likely to produce great bodily injury,” appears to require more violent force than that analyzed in *Turner*.

This Court noted that the test for determining physical force is whether the statute calls for “violent force capable of causing physical pain or injury to another.” *See Vail-Bailon*, 868 F.3d at 1302. Griffin’s statute of conviction required that he use a deadly weapon or “any means of force likely to produce great bodily injury.” *See Fla. Stat. § 951.075*. As such, reasonable jurists would not debate that an attempted assault or battery committed with a “deadly weapon” or “force likely to produce great bodily injury” has as an element the use, attempted use, or threatened use of physical force, as contemplated in § 924(e). *See id.*

Given this Court’s binding precedent discussed above, Griffin has not shown that jurists of reason would debate the district court’s conclusion that his 1996 conviction for aggravated assault and his 1992 conviction for attempted assault or battery in a county detention facility qualify as predicate offenses under the ACCA. As such, Griffin’s motion for a COA is DENIED.


UNITED STATES CIRCUIT JUDGE