

Petitioner's Appendices

871 F.3d 1215

United States Court of Appeals, Eleventh Circuit.

Jeffrey Bernard BEEMAN, Petitioner-Appellant,

v.

UNITED STATES of America, Respondent-Appellee.

No. 16-16710

|

(September 22, 2017)

Synopsis

Background: Defendant moved to vacate, set aside, or correct his sentence after he was convicted of possession with intent to distribute cocaine, and being felon in possession of firearm and ammunition, and his conviction was affirmed on appeal, 386 Fed.Appx. 827. The United States District Court for the Northern District of Georgia, Nos. 4:16-cv-00143-HLM, 4:08-cr-00038-HLM-WEJ-1, denied defendant's motion. Defendant appealed.

Holdings: The Court of Appeals, Julie Carnes, Circuit Judge, held that:

defendant asserted claim under *Johnson v. United States*, and thus filing of his motion to vacate, set aside, or correct his sentence within one year of that decision was timely;

Descamps v. United States did not set out newly recognized right, and therefore new limitation period did not apply to his claim that his aggravated assault conviction did not qualify as violent felony under elements clause of Armed Career Criminal Act (ACCA); and

defendant did not prove that it was more likely than not he in fact was sentenced as armed career criminal under residual clause of ACCA.

Affirmed.

Williams, Kathleen M. Williams, of the Southern District of Florida, sitting by designation, filed dissenting opinion.

West Codenotes**Recognized as Unconstitutional**

18 U.S.C.A. § 924(e)(2)(B)(ii)

***1217** Appeal from the United States District Court for the Northern District of Georgia, D.C. Docket Nos. 4:16-cv-00143-HLM, 4:08-cr-00038-HLM-WEJ-1

Attorneys and Law Firms

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Christopher Conrad Bly, John Andrew Horn, Jane Elizabeth McBath, Lawrence R. Sommerfeld, U.S. Attorney's Office, Atlanta, GA, for Respondent-Appellee.

Before JULIE CARNES and EDMONDSON, Circuit Judges, and WILLIAMS, * District Judge.

Opinion

JULIE CARNES, Circuit Judge:

In 2009 Jeffrey Bernard Beeman was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g), being a felon in possession of ammunition, in violation of 18 U.S.C. § 922(g), and possession with intent to distribute a mixture or substance containing a detectable amount of cocaine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C). Finding that Beeman was subject to enhanced sentences for his firearm and ammunition offenses under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), the district court imposed three concurrent 210-month sentences. In 2016 Beeman filed a 28 U.S.C. § 2255 motion to vacate his sentence, contending that he was entitled to resentencing because in *Johnson v. United States*, 576 U.S. —, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), the Supreme Court had struck down part of the ACCA as unconstitutionally vague. The district court denied his motion, and Beeman has appealed.

I. BACKGROUND

In 1990 Beeman was convicted in Georgia of aggravated assault. In 1999 he was convicted in Georgia of two counts of possession of cocaine with intent to distribute. Then, in 2009, he was convicted of the federal firearm, ammunition, and drug offenses giving rise to the 210-month sentences that he is challenging in his § 2255 motion.

Normally a conviction for being a felon in possession of a firearm or ammunition carries a statutory maximum sentence of ten years. 18 U.S.C. §§ 922(g), 924(a)(2). But if a defendant who is convicted of one of those offenses already has three or more convictions for a “violent felony” or a “serious drug offense,” the ACCA provides that he must be sentenced to at least 15 years of imprisonment. *Id.* § 924(e)(1). When Beeman was sentenced in 2009, the *1218 ACCA defined a “violent felony” as follows:

[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....

Id. § 924(e)(2)(B). The first prong of that definition, § 924(e)(2)(B)(i), is known as the “elements clause.” *Mays v. United States*, 817 F.3d 728, 730–31 (11th Cir. 2016). The second prong, § 924(e)(2)(B)(ii), is itself split into two clauses. The first part, listing burglary, arson, extortion, or an offense involving the use of explosives, is known as the “enumerated offenses clause,” and the second part is known as the “residual clause.” *Id.*

Beeman’s presentence investigation report (PSR) listed his conviction for aggravated assault and two convictions for possession of cocaine with intent to distribute and concluded that, based on those convictions, he qualified for the ACCA enhancement. Beeman did not object to that recommendation, and the district court adopted it without further discussion. The PSR did not recommend whether the aggravated assault conviction should be found to be a violent felony for ACCA purposes under the elements clause or the residual clause or both, and the district court did not specify whether its finding that the conviction qualified was based on the elements clause or the residual clause or both. Beeman appealed his convictions but not his sentences, and on July 8, 2010, this Court affirmed. *United States v. Beeman*, 386 Fed.Appx. 827, 835 (11th Cir. 2010).

On June 26, 2015, the United States Supreme Court held that the ACCA’s residual clause is unconstitutionally vague. *Johnson*, 135 S.Ct. at 2563. And in April 2016, the Court held that the *Johnson* decision is retroactively applicable to cases on collateral review. *Welch v. United States*, 578 U.S. —, 136 S.Ct. 1257, 1268, 194 L.Ed.2d 387 (2016).

On June 7, 2016, Beeman filed his § 2255 motion, attacking his ACCA-enhanced sentences for his firearm and ammunition offenses. His argument proceeded in three parts. First, he contended that the *Johnson* decision invalidated his ACCA sentences because when he was sentenced in 2009 his Georgia conviction for aggravated assault would have qualified as a violent felony under the residual clause of the ACCA. Second, he pointed out that his aggravated assault conviction was not a violent felony under the enumerated offenses clause because assault is not included in that list of crimes. And third, he argued that a conviction under the Georgia aggravated assault statute does not now qualify as a violent felony under the elements clause. In making that argument about the elements clause he relied heavily on the Supreme Court’s 2013 decision in *Descamps v. United States*, 570 U.S. 254, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013), which is one in a line of Supreme Court decisions describing how federal courts should determine whether an offense qualifies as a predicate offense under the ACCA’s enumerated offenses and elements clauses. *See Mathis v. United States*, 579 U.S. —, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016); *Descamps*, 133 S.Ct. 2276; *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005); *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990).

The district court denied Beeman’s § 2255 motion as untimely and, alternatively, *1219 on the merits. It determined that Beeman’s § 2255 motion was untimely because he filed it more than a year after his judgment of conviction became final and the motion failed to raise a true *Johnson* claim, instead “at its core, rel[ying] on *Descamps*.” As an alternative ground, the court determined that even under the *Descamps* decision, a Georgia conviction for aggravated assault qualifies as a violent felony under the ACCA’s elements clause.

II. DISCUSSION

A. The Time Bar

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“We review *de novo* the district court’s determination that a § 2255 motion to vacate is time-barred.” *Drury v. United States*, 507 F.3d 1295, 1296 (11th Cir. 2007). The Antiterrorism and Effective Death Penalty Act (AEDPA) provides a one-year statute of limitations to bring a § 2255 motion. 28 U.S.C. § 2255(f). The limitations period begins to run on the latest of four possible triggering dates. See *id.* Typically, the applicable triggering date is “the date on which the judgment of conviction becomes final.” *Id.* § 2255(f)(1). Beeman cannot rely on that limitations period, however, because he filed his § 2255 motion almost five years after its expiration. Instead, he asserts that his § 2255 motion is timely because he filed it within one year of the Supreme Court’s *Johnson* decision, bringing it within the limitations period that begins on “the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.” *Id.* § 2255(f)(3).

The § 2255(f) statute of limitations “requires a claim-by-claim approach to determine timeliness.” See *Zack v. Tucker*, 704 F.3d 917, 924, 926 (11th Cir. 2013) (en banc); accord *Davis v. United States*, 817 F.3d 319, 327–28 (7th Cir. 2016) (“But as every other circuit to have considered the question has concluded, and we now hold, the timeliness of each claim asserted in either a section 2255 motion or a petition challenging a state-court conviction under 28 U.S.C. § 2254 must be considered independently.”) (footnotes omitted). In other words, if a § 2255 movant asserts that his § 2255 motion is timely because he filed it within one year of the Supreme Court’s issuance of a decision recognizing a new right, we must determine whether each claim asserted in the motion depends on that new decision. If a particular claim does not depend on the new decision, that claim is untimely and must be dismissed.

In order for a Supreme Court decision to restart the one-year statute of limitations under § 2255(f)(3), the decision must both (1) recognize a new right and (2) be made retroactively applicable to cases on collateral review. See 28 U.S.C. § 2255(f)(3). The issuance of the Supreme Court’s *Johnson* decision meets both of those requirements. The Supreme Court held in *Welch* that *Johnson* announced a new rule that is retroactively applicable to cases on collateral review. See *Welch*, 136 S.Ct. at 1268. Because the Supreme Court issued *Johnson* on June 26, 2015, *Johnson*, — U.S. —, 135 S.Ct. 2551,

192 L.Ed.2d 569, a § 2255 movant wishing to raise a *Johnson* claim had until June 26, 2016, to file a motion obtaining that claim. See 28 U.S.C. § 2255(f)(3).

On the other hand, the issuance of the *Descamps* decision cannot qualify as a triggering date under § 2255(f)(3). It is true that we have held that the *Descamps* decision is retroactively applicable to cases on collateral review. *Mays*, 817 F.3d at 733–34. But being retroactively applicable to cases on collateral review is only part of the test for restarting the statute of limitations. AEDPA also requires that the right *1220 have been “newly recognized by the Supreme Court.” 28 U.S.C. § 2255(f)(3).

In holding that the *Descamps* decision is retroactively applicable to cases on collateral review, our *Mays* decision makes clear that *Descamps* did not set out a newly recognized right. In fact, we based our decision on the recognition that “*Descamps* did not announce a new rule—its holding merely clarified existing precedent.” 817 F.3d at 734; see also *Descamps*, 133 S.Ct. at 2283 (“Our caselaw explaining the categorical approach and its ‘modified’ counterpart all but resolves this case.”). And as we have explained, “[i]f the decision merely clarifies an old rule, the petitioner will not be able to take advantage of the extended statute of limitations under § 2255, which requires a newly recognized right by the Supreme Court.” *Figueroa-Sanchez v. United States*, 678 F.3d 1203, 1207 n.4 (11th Cir. 2012). As a result, a § 2255 movant wishing to raise a *Descamps* claim cannot rely on subsection (f)(3) as the starting point for the calculation of the limitations period. Instead, he must file his motion within one year of one of the other triggering dates set out in § 2255(f).

Beeman’s judgment of conviction became final in October 2010, meaning that the one-year statute of limitations under § 2255(f)(1) expired in October 2011. He did not file his § 2255 motion until June 7, 2016, almost five years later. The extended § 2255(f)(3) limitations period for raising a *Johnson* claim expired on June 26, 2016, the one-year anniversary of the *Johnson* decision. As a result, if his § 2255 motion raised a *Johnson* claim, that claim was timely, but any other claim the motion raised—including a *Descamps* claim—was untimely.

A *Johnson* claim and a *Descamps* claim make two very different assertions. A *Johnson* claim contends that the defendant was sentenced as an armed career criminal under the residual clause, while a *Descamps* claim asserts

that the defendant was incorrectly sentenced as an armed career criminal under the elements or enumerated offenses clause. Beeman raised both of those claims in his § 2255 motion. He focused largely on an argument that the 2013 *Descamps* decision meant that his Georgia conviction for aggravated assault could no longer qualify as a violent felony under the elements clause. That is obviously a *Descamps* claim. But he also claimed that when sentencing him in 2009, the district court relied on the residual clause to find that his aggravated assault conviction qualified as a violent felony under the ACCA. In support of that proposition, he asserted that aggravated assault in Georgia was a crime “which historically qualified as an ACCA predicate under that statute’s residual clause.” Therefore, he contended that the *Johnson* decision required he be resentenced without the ACCA enhancement. That sounds like a *Johnson* claim.

The district court determined that Beeman’s § 2255 motion was untimely because it raised only a *Descamps* claim. We agree that the motion raised an untimely *Descamps* claim, and that part of the district court’s order is due to be affirmed on that ground.

We disagree, however, with the district court’s conclusion that Beeman’s § 2255 motion did not also assert a *Johnson* claim. Given Beeman’s heavy reliance on *Descamps* in support of his motion, the district court’s conclusion on that point is understandable. Nevertheless, Beeman’s motion did allege that, Georgia aggravated assault, which was one of his three qualifying ACCA convictions, “historically qualified as an ACCA predicate under [the ACCA]’s residual clause,” and that “in recent years, the Eleventh Circuit has been using the residual clause as a default home for many state statutes that might otherwise have *1221 been counted under the elements or enumerated crimes clauses.” He also filed his motion 19 days before the one-year anniversary of the *Johnson* decision. See 28 U.S.C. § 2255(f)(3) (“The limitation period shall run from ... the date on which the right asserted was initially recognized by the Supreme Court....”). Under the circumstances, the motion said enough to assert a *Johnson* claim.

Regardless of the ground stated in the district court’s order or judgment, “[w]e may affirm on any ground supported by the record.” *Castillo v. United States*, 816 F.3d 1300, 1303 (11th Cir. 2016). In this case, the record

makes clear that the district court’s dismissal of the § 2255 motion was the correct result as to the *Johnson* claim because—although timely raised—Beeman has not carried his burden of proving that claim on the merits. He did not request an evidentiary hearing in the district court, and he has not suggested in this Court that a remand for an evidentiary hearing would do him any good. Instead, he has chosen to proceed on the basis of the record as it now exists, and we consider his *Johnson* claim on that record.

B. The Merits

To prove a *Johnson* claim, a movant must establish that his sentence enhancement “turn[ed] on the validity of the residual clause.” In other words, he must show that the clause actually adversely affected the sentence he received.

In re Thomas, 823 F.3d 1345, 1349 (11th Cir. 2016).¹ Only if the movant would not have been sentenced as an armed career criminal absent the existence of the residual clause is there a *Johnson* violation. That will be the case only (1) if the sentencing court relied solely on the residual clause, as opposed to also or solely relying on either the enumerated offenses clause or elements clause (neither of which were called into question by *Johnson*) to qualify a prior conviction as a violent felony, and (2) if there were not at least three other prior convictions that could have qualified under either of those two clauses as a violent felony, or as a serious drug offense.

Critical to our decision on the merits issue in this case is the burden of proof and persuasion. The Government contends that a § 2255 movant bears the burden of proving that his sentencing enhancement was imposed because the sentencing court used the residual clause. Beeman argues that if it is merely possible that the court relied on that clause to enhance the sentence, then he has met his burden.² We conclude, and hold, that, like any other § 2255 movant, a *Johnson* § 2255 claimant must prove his claim.³ To prove a *Johnson* *1222 claim, the movant must show that—more likely than not—it was use of the residual clause that led to the sentencing court’s enhancement of his sentence. If it is just as likely that the sentencing court relied on the elements or enumerated offenses clause, solely or as an alternative basis for the enhancement, then the movant has failed to show that his enhancement was due to use of the residual clause.

We rest our conclusion that a § 2255 movant must prove his *Johnson* claim on a long line of authority holding that

a § 2255 movant “bears the burden to prove the claims in his § 2255 motion.” *Rivers v. United States*, 777 F.3d 1306, 1316 (11th Cir. 2015); *LeCroy v. United States*, 739 F.3d 1297, 1321 (11th Cir. 2014); *Barnes v. United States*, 579 F.2d 364, 366 (5th Cir. 1978) (“Under Section 2255, [the movant] had the burden of showing that he was entitled to relief.”); *Coon v. United States*, 441 F.2d 279, 280 (5th Cir. 1971) (“A movant in a collateral attack upon a judgment has the burden to allege and prove facts which would entitle him to relief.”).

And we are not alone in so holding. See *United States v. Pettiford*, 612 F.3d 270, 277 (4th Cir. 2010) (“[T]he district court must determine whether the [§ 2255 movant] has met his burden of showing that his sentence is unlawful on one of the specified grounds.”); *United States v. DiCarlo*, 575 F.2d 952, 954 (1st Cir. 1978) (“In seeking collaterally to attack their convictions under section 2255, [movants] bear the burden of establishing by a preponderance of the evidence that they are entitled to relief.”); *Zovluck v. United States*, 448 F.2d 339, 341 (2d Cir. 1971) (stating, in the context of an appeal from the denial of a § 2255 motion, that “[t]here is no doubt but that appellant had the burden of proof”); *United States v. Trumblay*, 234 F.2d 273, 275 (7th Cir. 1956) (“On a motion to vacate, set aside or correct a sentence, a movant has the burden of proof.”); *Taylor v. United States*, 229 F.2d 826, 832 (8th Cir. 1956) (“Because the statutory proceeding is a collateral attack upon the judgment of conviction, the burden is on the [movant] to establish a basis for relief under some one or more of the grounds set forth in [§ 2255].”).

As to our own precedent requiring a § 2255 movant to prove his entitlement to relief, in the *Rivers* decision, we held that *Rivers*’s “motion must ... be denied” because he “[had] not met his burden of proof” where the only evidence he offered in support of his claim was testimony that the district court did not credit. 777 F.3d at 1318; see also *id.* at 1316.

Similarly, in the *LeCroy* case, the petitioner asserted that counsel was ineffective for failing to call an expert witness who could have presented mitigation evidence about his childhood. 739 F.3d at 1313–14. His attorneys had decided not to present the expert witness because they feared that if they did, the Government would conduct its own evaluation of him and present a rebuttal expert whose evidence could be damaging. *Id.* at 1321. *LeCroy* argued that his attorneys’ “fear of a Government evaluation”

was irrational and that they could have allowed the Government to conduct the evaluation, seen what it said, and then decided whether to present the defense expert. *Id.* This Court explained that *LeCroy*’s argument:

inverts the burden of proof, which on a § 2255 petition belongs to the petitioner. If *LeCroy*’s claim is that a Government evaluation would have been less damaging than [his expert]’s evaluation—and that, accordingly, the defense team *1223 ought to have been more willing to roll the dice and see what the Government would come up with—then to carry that argument *LeCroy* would actually need to show that the Government evaluation would be favorable. Otherwise, *LeCroy* is asking us to disregard the burden of proof and speculate about what might have been, drawing an inference in his favor that the record simply does not support. Here, where *LeCroy* is either unwilling or unable to demonstrate that the Government’s evaluation would *in fact* have been favorable—as opposed to conceivably being favorable—he has failed to carry his burden in showing prejudice.

Id. at 1321–22 (underlined emphasis added).

Our long line of decisions holding that a § 2255 movant must bear the burden of proving his entitlement to relief makes sense. “[O]ne of the principal functions of AEDPA was to ensure a greater degree of finality for convictions.” *Johnson v. United States*, 340 F.3d 1219, 1224 (11th Cir. 2003); see also *Jones v. United States*, 304 F.3d 1035, 1039 (11th Cir. 2002) (“A fundamental purpose for the AEDPA was to establish finality in post-conviction proceedings.”). Even before AEDPA, the Supreme Court had instructed us that “direct appeal is the primary avenue for review of a conviction or sentence.... When the process of direct review ... comes to an end, a presumption of finality and legality attaches to the conviction and sentence.” *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 3391–92, 77 L.Ed.2d 1090 (1983). Finality “is essential to the operation of our criminal justice system. Without finality,

the criminal law is deprived of much of its deterrent effect.” *Teague v. Lane*, 489 U.S. 288, 309, 109 S.Ct. 1060, 1074, 103 L.Ed.2d 334 (1989). Putting the burden of proof and persuasion on the Government in a § 2255 proceeding to show the absence of a constitutional violation or that an error had no effect on the judgment would undermine the presumption of finality that attaches at the end of the direct appeal process. It would go a long way toward creating a presumption of non-finality and undermine the important interests that finality protects.

In spite of all the above caselaw, Beeman contends that “[t]he rule must be this: A *Johnson* movant has met his burden to show that he has a right to § 2255 relief ... unless the record affirmatively shows that the district court relied upon the ACCA’s elements clause.” He would, to borrow the language of our *LeCroy* decision, have us invert the burden of proof and persuasion by taking well-established principles developed in numerous decisions over the years and turning them entirely upside down. We have to do this, he urges, because district courts have never been required to say, and as a result have not always expressly stated, which of the ACCA’s clauses they are relying on when finding that a conviction qualifies as a violent felony. As a result, Beeman argues, if we treat *Johnson* movants like every other § 2255 movant, and require them to shoulder their burden of proof and persuasion, it is unlikely that many of these prisoners will succeed in showing they are due relief.

Even if we accept Beeman’s factual premise about what sentencing records typically show or don’t show, we reject his legal premise that the burden of proof and persuasion should be overhauled for the purpose of increasing the number of cases in which the movant prevails. The burden of proof and persuasion reflects longstanding and fundamental interests in finality. It is by application of the appropriate burden that the outcome of a case is supposed to be determined, not the other way around. This approach is as true with *Johnson* claims as with any other type of claim.

Nor are we persuaded by Beeman’s argument that requiring a § 2255 movant *1224 raising a *Johnson* claim to carry his burden of proof and persuasion would make the outcome depend on the “fluke” of a district court having expressly stated which clause it was relying on. If true, that would be equally true whichever side bears the burden. It is no more arbitrary to have the movant

lose in a § 2255 proceeding because of a silent record than to have the Government lose because of one. What would be arbitrary is to treat *Johnson* claimants differently than all other § 2255 movants claiming a constitutional violation.⁴

Beeman concedes that there is nothing in the record suggesting that the district court relied on only the residual clause in sentencing him. In his § 2255 motion, he stated in conclusory terms that the district court must have relied on the residual clause, but nothing in the record supports this argument; and Beeman has pointed to no precedent in 2009 holding, or otherwise making obvious, that a violation of Georgia’s aggravated assault statute qualified as a violent felony only under the residual clause.⁵ Instead, citing to no authority, his motion merely asserts in general terms that “a Georgia conviction for aggravated assault ... [has] historically qualified as an ACCA predicate under [the ACCA]’s residual clause.” Beeman—relying only on cases involving Florida burglary convictions—also contends that this Court has “been using the residual clause as a default home for many state statutes that might otherwise have been counted under the elements or enumerated crimes clauses.” These general observations, however, are not enough to carry his burden of establishing that he, in fact, was sentenced as an armed career criminal here solely because of the residual clause.

In his reply to the Government’s answer to his § 2255 motion, Beeman conceded that it is unclear⁶ from the *1225 record whether the sentencing court had relied on the residual clause or the elements clause, or both, in finding that his aggravated assault conviction qualified as a violent felony. “Where, as here, the evidence does not clearly explain what happened ... the party with the burden loses.” *Romine v. Head*, 253 F.3d 1349, 1357 (11th Cir. 2001); see also *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56, 126 S.Ct. 528, 533–34, 163 L.Ed.2d 387 (2005) (explaining that the term “burden of persuasion” means that the party with the burden “loses if the evidence is closely balanced”); *Dynamic Drinkware, LLC v. Nat’l Graphics, Inc.*, 800 F.3d 1375, 1378–79 (Fed. Cir. 2015) (“Failure to prove the matter as required by the applicable standard means that the party with the burden of persuasion loses on that point—thus, if the fact trier of the issue is left uncertain, the party with the burden loses.”) (quotation marks omitted); *Lovell ex rel. Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 373 (9th Cir.

1996) (“In general, if the evidence is evenly balanced, such that a decision on the point cannot be made one way or the other, then the party with the burden of persuasion loses.”); *Cuppett v. Duckworth*, 8 F.3d 1132, 1140 n.5 (7th Cir. 1993) (“A party with the burden of persuasion loses if he fails to meet that burden.”).

Given this record, Beeman’s *Johnson* claim was therefore due to be dismissed because he failed to carry his burden of proof. Specifically, he failed to prove—that it was more likely than not—he in fact was sentenced as an armed career criminal under the residual clause. Having failed to prove that but for the residual clause he would have received a different sentence, he cannot prevail. For that reason, we **AFFIRM**.

WILLIAMS, District Judge, Dissenting:

I agree with the majority that Beeman’s *Johnson* claim is timely,¹ and that he unequivocally bears the burden of establishing his right to relief. I cannot agree, however, that he has failed to adequately demonstrate that he was sentenced under the residual clause of the Armed Career Criminal Act (“ACCA”), or that his claim is substantively without merit. Specifically, I do not believe that the merits of Beeman’s timely *Johnson* claim can be properly assessed without reaching the question of whether his conviction for aggravated assault in Georgia qualifies as a proper predicate offense under the elements clause of the ACCA, an issue that was fully briefed and ripe for adjudication on this record.

Since the Supreme Court’s decision in *Johnson*—or more specifically the pronouncement *1226 in *Welch* that *Johnson* would be retroactively applicable on collateral review—courts have reviewed a torrent of habeas petitions challenging sentences that relied on the mandatory minimums meted out pursuant to the ACCA. In each case, the same standard has been applied: First, the movant must show that he was sentenced under the now-invalidated residual clause of the ACCA. Second, the movant must show that he could not have been sentenced under any other portion of the statute, namely the elements clause and the enumerated clause. *See Johnson v. United States*, — U.S. —, 135 S.Ct. 2551, 2563, 192 L.Ed.2d 569 (2015) (clarifying that “[the] decision does 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.”). I agree that the burden of

making this showing and demonstrating a right to relief rests squarely with the movant—here, Beeman. Upon a review of his motion and the record, however, I believe that Beeman has met that burden.

As an initial matter, the majority conflates Beeman’s argument that he *could not have been sentenced* under the elements clause—made in the context of establishing his *Johnson* claim—with the argument that he *was improperly sentenced* under the elements clause—which would constitute an untimely *Descamps* claim. Specifically, the majority observes that Beeman’s petition “focused largely on an argument that the 2013 *Descamps* decision meant that his Georgia conviction for aggravated assault could no longer qualify as a violent felony under the elements clause” and concludes that this “is obviously a *Descamps* claim.”

This conclusion, however, ignores both the unambiguous statements presented in Beeman’s habeas petition and the established standards of the courts for demonstrating a defendant’s right to relief under *Johnson*. With regard to the former, Beeman’s motion in the district court opened with the following statement: “Mr. Beeman challenges his sentence on one ground: In light of *Johnson v. United States*, the 210-month prison sentences on Counts One and Four, each imposed under [the ACCA], are unlawful.” The motion goes on to argue that “the ACCA’s residual clause, the basis for Mr. Beeman’s harsh, ACCA-enhanced sentence ... is now extinct,” and that Beeman is entitled to relief because, in light of that change in the law, he no longer has three qualifying predicate crimes under the remaining language of the ACCA.

As to existing precedent on this issue, it has been established in the context of second or successive habeas petitions that “when an applicant’s ‘claim implicates *Johnson*,’ we must apply binding Supreme Court precedent such as *Descamps*, even if this precedent does not on its own establish ‘an independent claim that is itself subject to the gatekeeping requirements [of 28 U.S.C. § 2255(h)]’ ... in determining whether a prior conviction would still support an enhanced ACCA sentence.” *In re Rogers*, 825 F.3d 1335, 1339 (11th Cir. 2016); *see also In re Adams*, 825 F.3d 1283, 1286 (11th Cir. 2016) (distinguishing cases where “petitioners were forced to rely on *Descamps* as a standalone claim” from cases where *Johnson* is implicated because “the sentencing court may have relied on the residual clause,” and finding in

the latter situation that “the ambiguity surrounding the sentencing court’s decision requires us to look to the text of the relevant statutes, [and] ... guiding precedent, such as *Descamps*, to ensure we apply the correct meaning of the ACCA’s words.”). Similarly, establishing that a predicate offense could not qualify under the elements clause by applying the *Descamps* framework has been part and parcel of many district court determinations *1227 that a movant is entitled to relief under *Johnson*. See, e.g., *Wojcieszak v. United States*, 196 F.Supp.3d 1319 (S.D. Fla. 2016); *Cochran v. United States*, No. 16-22506-CIV, 2017 WL 3084582 (S.D. Fla. June 16, 2017), report and recommendation adopted, No. 16-22506-CIV, 2017 WL 3085336 (S.D. Fla. July 19, 2017); *Givens v. United States*, No. 4:16-CV-1143 CAS, 2016 WL 7242162 (E.D. Mo. Dec. 15, 2016), appeal dismissed, No. 17-1199, 2017 WL 3273416 (8th Cir. Feb. 8, 2017); *Nichols v. United States*, No. 1:04-CR-68-TRM-CHS-1, 2016 WL 5921780 (E.D. Tenn. Oct. 11, 2016); *United States v. Wilson*, No. CR 96-0157, 2017 WL 1383644 (D.D.C. Apr. 18, 2017); *Shabazz v. United States*, No. 3:16-CV-1083 (SRU), 2017 WL 27394 (D. Conn. Jan. 3, 2017); *Memoli v. United States*, No. 04CR140 (JSR), 2017 WL 3559190 (S.D.N.Y. July 11, 2017), report and recommendation adopted in part, No. 16-CV-4097 (JSR), 2017 WL 3504918 (S.D.N.Y. Aug. 15, 2017).

Though presented as a distinct “timeliness” holding, the majority’s misapprehension of Beeman’s *Descamps* arguments directly impacts the Court’s analysis on the merits of his *Johnson* claim. As set out above, in order to prevail on a *Johnson* claim, a movant must first establish that he was sentenced under the residual clause, and then must show that his predicate crimes could not qualify under any other portion of the ACCA. But precluding discussion of *Descamps* in support of a *Johnson* motion contrives an issue with regard to both of these required showings. As to the first prong, it forecloses an avenue of evidentiary support that, in many instances, could conclusively demonstrate a sentencing court’s reliance on the now-defunct residual clause. As to the second, it creates a standard under which the movant must establish that his predicate crimes could not qualify under any remaining clause of the ACCA, without allowing him to argue that his predicate crimes do not qualify under the elements clause based on binding Supreme Court precedent.²

The case at hand is illustrative of this conflict, particularly with regard to the first prong of *Johnson*. By artificially delineating what constitutes a *Johnson* argument—and by disposing of Beeman’s petition without reaching the second required showing for success on a *Johnson* claim—the majority elides all of Beeman’s elements-clause arguments from their *Johnson* analysis, leaving Beeman with “insufficient” assertions regarding the sentencing court’s reliance on the residual clause, which the majority peremptorily rejects. In so doing, the majority has set up a straw man regarding Beeman’s *Johnson* arguments that they then proceed to knock down.

The majority opinion’s discussion of the merits of Beeman’s *Johnson* claim starts off on the right track. It accurately explains that, in order to obtain relief, Beeman must show that “(1) [] the sentencing court relied solely on the residual clause” and “(2) [] there were not at least three other prior convictions that could have qualified under [the elements or the enumerated] clauses as a violent felony, or as a serious drug offense.” It goes on to discuss the appropriate burden of proof, and states that a movant must first demonstrate that it is “more likely than not” that he was sentenced under the residual clause *1228 in order to obtain relief under *Johnson*. Our paths diverge, however, on the question of how that standard may be met.

When approaching this question, I do not write on a blank slate. Previous decisions of this Court have posited a “clear/unclear” test that has been consistently applied when answering this precise question in the *Johnson* context on applications for leave to file a second or successive habeas petition. Under that test, *Johnson* is “implicated” when the sentencing court did not specify the statutory basis for the qualifying predicates and there is no precedent establishing that the predicates would qualify under one of the remaining ACCA clauses. *In re Rogers*, 825 F.3d 1335, 1339 (11th Cir. 2016) (citing, among others, *In re Adams*, 825 F.3d at 1284). In such circumstances, “courts must apply *Descamps* and other binding Supreme Court precedent in determining whether a prior conviction would still support an enhanced ACCA sentence.” *Id.* There is no logically sound justification—and none is offered by the majority—for discarding the clear/unclear paradigm and approaching a *Johnson* claim differently in the context of an initial habeas petition.³ Indeed, many district courts across the country have adopted this approach in evaluating *Johnson* claims on

initial habeas petitions with an unclear sentencing record. *See, e.g., United States v. Booker*, 240 F.Supp.3d 164, 167–68 (D.D.C. Mar. 2, 2017) (noting that “[f]irst, judges are not required by law to state at sentencing whether they are relying on the residual clause or the elements clause.... [and] [s]econd, there was no practical reason for judges to make this distinction at sentencing prior to June 26, 2015, when the Supreme Court decided that the residual clause was void for vagueness.”); *Burgess v. United States*, No. CR493-205, 2017 WL 1943988, at *3 n.9 (S.D. Ga. Apr. 27, 2017), report and recommendation adopted, No. CR493-205, 2017 WL 2834492 (S.D. Ga. June 29, 2017) (“Movant’s burden is only to show that—absent a clear record—the sentencing judge may have used the residual clause.”); *United States v. James*, No. 06-20172-JWL, 2016 WL 3936495 (D. Kan. July 21, 2016); *United States v. Hamilton*, 235 F.Supp.3d 1229 (N.D. Okla. 2017); *Williams v. United States*, No. 4:16CV00993 ERW, 2017 WL 895910 (E.D. Mo. Mar. 7, 2017); *Thrower v. United States*, 234 F.Supp.3d 372 (E.D.N.Y. 2017); *United States v. Wolf*, No. 1:04-CR-347-1, 2016 WL 6433151 (M.D. Pa. Oct. 31, 2016); *United States v. Ballard*, No. CR 03-810, 2017 WL 2935725 (E.D. Pa. July 10, 2017); *Givens v. United States*, No. 4:16-CV-1143 CAS, 2016 WL 7242162 (E.D. Mo. Dec. 15, 2016), appeal dismissed, No. 17-1199, 2017 WL 3273416 (8th Cir. Feb. 8, 2017).

Even absent these decisions, however, it is clear that any alternative to this test—in other words, any standard under which an unclear sentencing record precludes relief under *Johnson*—would lead to unwarranted and inequitable results. In his briefs, and again at oral argument, Beeman offered *1229 the example from *In Re: Chance*, 831 F.3d 1335 (11th Cir. 2016), involving two defendants, sentenced on the same day, for the same offense, by the same judge, with the same ACCA predicates. Under the majority’s rationale, one of the defendants could bring a *Johnson* claim because the judge specified that he was sentenced under the residual clause, but the other defendant could not, because the judge used no such language and made no specific reference to any ACCA sub-clause. Adopting the approach of the majority and permitting this scenario to play out in our courts not only would be unfair, but also would nullify the retroactive effect of a change in the law pronounced by the Supreme Court.⁴ I can see no basis for predicating a defendant’s right to relief on the precision of the verbiage employed by a judge, an attorney, or even a defendant himself at the time of sentencing, when the highest court

has announced that “[t]he residual clause is invalid under *Johnson*, so it can no longer mandate or authorize any sentence.” *Welch v. United States*, — U.S. —, 136 S.Ct. 1257, 1265, 194 L.Ed.2d 387 (2016).⁵ As such, it should “make[] no difference whether the sentencing judge used the words ‘residual clause’ or ‘elements clause,’ or some similar phrase”; courts should not “penalize a movant for a [sentencing] court’s discretionary choice not to specify under which clause of Section 924(e)(2)(B) an offense qualified as a violent felony.” *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017) (citing with approval *In re Chance*, 831 F.3d 1335); *see also United States v. Geozos*, 870 F.3d 890, 894–95, 2017 WL 3712155 (9th Cir. 2017) (citing with approval *In re Chance*, 831 F.3d 1335). “If *Johnson* means that an inmate’s [] companion conviction should not have served as [a predicate offense under the statute] ... then the text of [the statute] no longer authorizes his sentence and his imprisonment is unlawful.” *In re Chance*, 831 F.3d at 1341; *see also Geozos*, 870 F.3d at 895, 2017 WL 3712155 at *4 (“[W]hen it is unclear from the record whether the sentencing court relied on the residual clause, it necessarily is unclear whether the court relied on a constitutionally valid or a constitutionally invalid legal theory.”).

To be sure, the inquiry does not end there. When the sentencing record is inconclusive, a movant must still bear the burden of showing—either through direct or circumstantial evidence—that he was, in fact, sentenced under the residual clause.⁶ Indeed, Beeman has attempted to do just that by demonstrating that he could not *1230 possibly have been sentenced under any other clause of the ACCA. The majority does not reach the question of whether this type of circumstantial evidence of reliance on the residual clause should be permitted because, as noted above, they improperly categorize these arguments as an “untimely *Descamps* claim” and exclude them from the discussion of Beeman’s *Johnson* claims.⁷

The majority characterizes this framework as implicating some order of “burden shifting” that would break from long-standing precedent regarding a movant’s obligation to establish his entitlement to constitutional relief and allow unmeritorious claims to succeed. This is not the case. Under the clear/unclear rubric, an unclear record does not entitle a movant to relief. Instead, it permits a defendant to bring a *Johnson* claim and to adduce evidence that establishes, conclusively, that he was sentenced under

the residual clause. Far from opening the jailhouse doors based on ambiguities in the record, this analysis simply gives potentially eligible defendants the opportunity to prove that they are entitled to relief where, as here, the sentencing documents and record transcripts are silent. Though it is true that the courts may have to address some unmeritorious petitions because of this rule, this cannot be the basis for precluding access to the courts and “permitting the criminal process to rest at a point where it ought properly never to repose.” *Mackey v. United States*, 401 U.S. 667, 693, 91 S.Ct. 1160, 28 L.Ed.2d 404 (opinion of Harlan, J.).

In a case like this, where a movant attempts to satisfy the first prong of the *Johnson* inquiry through circumstantial evidence by demonstrating that he could not have been properly sentenced under any other portion of the statute, the first and second prongs for success on the merits coalesce into a single inquiry. The fact that a single showing satisfies both requirements for *Johnson* relief, however, in no way diminishes the evidentiary burden of a movant or otherwise shifts that burden to the Government. Again, Beeman must prove that it was more likely than not that he was sentenced under the residual clause in order to succeed on his *Johnson* claim. I believe that Beeman has done so by demonstrating that he could not have been sentenced under any other clause of the ACCA. Because it is uncontested that Beeman does not qualify under the enumerated clause, and because there are only two other ways to qualify as a career offender under the ACCA, disproving one is necessarily proof of the other. See *In Re Chance*, 831 F.3d at 1340. Beeman’s showing that he *could not* have been convicted under the elements clause of the ACCA⁸ is therefore proof of both requirements for success on the merits of a *Johnson* claim: first, that he was sentenced under the residual clause, and

second, that his predicate offenses could not qualify under the ACCA absent that provision. I can ascertain no basis upon which to exclude this type of circumstantial evidence in evaluating a movant’s habeas petition, and, as noted above, believe that doing so would create an unjustifiable procedural *1231 bar based solely on the manner in which a movant’s sentence was pronounced.

I do not take issue with the importance of finality of judgments in our legal system or the importance of efficiency in the apportionment of judicial resources wherever possible. But the vindication of constitutional rights must be of paramount importance in any decisions that impact access to the courts. In deciding to make *Johnson* retroactively applicable, the Supreme Court considered these conflicting interests, and concluded that “where the conviction or sentence in fact is not authorized by substantive law, then finality interests are at their weakest.” *Welch*, 136 S.Ct. at 1266. Accordingly, while I understand the majority’s desire to identify a bright-line rule through which unmeritorious *Johnson* claims can be culled without engaging in a predicate-by-predicate determination of what crimes still qualify under the ACCA, I cannot agree to a standard that excludes petitioners because the process of evaluation is particularly laborious. I fear that the practical effect of today’s opinion is that many criminal defendants like Beeman who were, in fact, sentenced under a constitutionally infirm statute will be denied their right to seek the relief to which they may very well be entitled by the holdings of the Supreme Court. For that reason, I respectfully dissent.

All Citations

871 F.3d 1215, 27 Fla. L. Weekly Fed. C 246

Footnotes

- * The Honorable Kathleen M. Williams, of the Southern District of Florida, sitting by designation.
- 1 It makes no difference that *Thomas* was decided in the context of a prisoner’s application for certification to file a second or successive § 2255 motion. The *Thomas* decision held that an applicant could not make even a prima facie showing of a *Johnson* claim if the *Johnson* decision did not affect his sentence. An applicant who cannot make even a prima facie showing that his § 2255 motion contains a *Johnson* claim will necessarily be unable to shoulder his burden of proving that he is actually entitled to relief under the *Johnson* decision.
 - 2 Actually, Beeman puts it more strongly. He says that unless the record affirmatively shows that the district court relied on a clause other than the residual clause, we are required to conclude that it was the residual clause on which the enhancement was based.
 - 3 Our Court has previously stated in dicta that a *Johnson* movant does bear the burden of proof, as argued by the Government. See *In re Moore*, 830 F.3d 1268, 1272–73 (11th Cir. 2016). In a subsequent opinion, the Court endorsed in

dicta the position now advocated by Beeman that a movant must merely show the possibility that the court relied on the residual clause to enhance the sentence. See *In re Chance*, 831 F.3d 1335, 1338–42 (11th Cir. 2016). As to the case before us now, we have not deferred to dicta. We have examined this issue afresh in reaching our conclusion based on what we see as traditional legal principles.

4 We do not mean to imply that every sentencing record will lack sufficient evidence about whether the district court relied on the residual clause in finding that the defendant was an armed career criminal. Some sentencing records may contain direct evidence: comments or findings by the sentencing judge indicating that the residual clause was relied on and was essential to application of the ACCA in that case. Nor do we mean to suggest that there will not sometimes be sufficient circumstantial evidence to show the specific basis of the enhancement. For example, there could be statements in the PSR, which were not objected to, recommending that the enumerated clause and the elements clause did not apply to the prior conviction in question and did not apply to other prior convictions that could have served to justify application of the ACCA. Or the sentencing record may contain concessions by the prosecutor that those two other clauses do not apply to the conviction in question or others. And there could be other circumstances on which a movant can rely; the above are but a few examples. Each case must be judged on its own facts.

5 We note that Beeman has likewise pointed to no precedent since 2009 so holding. But even if such precedent had been announced since Beeman's sentencing hearing, it would not answer the question before us. What we must determine is a historical fact: was Beeman in 2009 sentenced solely per the residual clause? And as noted, Beeman bears the burden of proving that historical fact. Certainly, if the law was clear at the time of sentencing that only the residual clause would authorize a finding that the prior conviction was a violent felony, that circumstance would strongly point to a sentencing per the residual clause. However, a sentencing court's decision today that Georgia aggravated assault no longer qualifies under present law as a violent felony under the elements clause (and thus could now qualify only under the defunct residual clause) would be a decision that casts very little light, if any, on the key question of historical fact here: whether in 2009 Beeman was, in fact, sentenced under the residual clause only.

6 The "clear/unclear test" discussed in *In re Rogers*, 825 F.3d 1335 (11th Cir. 2016) is inapplicable here. That test was established expressly as a means of making a preliminary determination about whether a habeas petitioner had made out a prima facie showing sufficient to warrant leave to file a second or successive section 2255 motion. The "clear/unclear test" merely allows a defendant to bring a *Johnson* claim and the opportunity—at the merits stage—to produce evidence establishing that he was actually sentenced solely under the residual clause. Here, Beeman has been permitted to raise his claim; but his lack of evidence has failed to satisfy his ultimate burden of proof.

1 I also agree with the majority's implicit rejection of the Government's arguments regarding procedural default or untimeliness under AEDPA, which would result in eligible defendants "remain[ing] imprisoned solely because [they] did not raise an argument on appeal that was foreclosed by Supreme Court precedent at the time—and would have been deemed frivolous." *Duhart v. United States*, No. 16-cv-61499-MARRA, 2016 WL 4720424, at *3 (S.D. Fla. Sept. 9, 2016); see also *West v. United States*, No. 16-cv-22459-KMW (S.D. Fla. Mar. 22, 2017); *Vasquez v. United States*, No. 16-cv-14247-JEM (S.D. Fla. Dec. 6, 2016), report and recommendation adopted, No. 16-cv-14247-JEM (S.D. Fla. Feb. 14, 2017).

2 As the majority correctly points out, *Descamps* did not articulate a new rule of constitutional law, but rather "merely clarified existing precedent." *Mays v. United States*, 817 F.3d 728, 734 (11th Cir. 2016). If that is the case, not only is Beeman permitted to rely on *Descamps* in arguing that he is entitled to *Johnson* relief, but he is, in fact, required to do so.

3 As applied in the "gatekeeping" context of a second or successive habeas petition, the purpose of the clear/unclear test is to permit a petitioner to prove a constitutional right to relief in a circumstance where "it necessarily is unclear whether the court relied on a constitutionally valid or a constitutionally invalid legal theory." *United States v. Geozos*, 870 F.3d 890, 895, 2017 WL 3712155, at *4 (9th Cir. 2017). That same inquiry is precisely the question that must be answered when ruling on the merits of a *Johnson* claim, given that a petitioner is only entitled to relief under that decision if he is able to prove that he was sentenced under a constitutionally infirm provision of the ACCA. As such, the previous reasoning of this Court in cases such as *In re Chance*, *In re Rogers*, *In re Adams*, and many others—as well as the decisions of the other courts cited *infra*—is both instructive and highly persuasive in deciding the issue before us.

4 See also *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017) (acknowledging that such an approach "would result in 'selective application' of the new rule of constitutional law announced in *Johnson* [], violating 'the principle of treating similarly situated defendants the same.' ") (internal citations omitted).

5 As this Court has recently observed, "[i]t is a safe operating assumption that when the Supreme Court articulates a standard, it actually means the words it has used to set out that standard...." *United States v. Eddy Wilmer Vail-Bailon*, 868 F.3d 1293, 1301 (11th Cir. 2017). In the case of *Johnson*, the plain language of the decision makes clear that relief under

the holding is not predicated upon a specific finding at sentencing, but rather the absence of a constitutional basis for the sentence imposed. *Welch*, 136 S.Ct. at 1265 (“*Johnson* establishes, in other words, that ‘even the use of impeccable factfinding procedures could not legitimate’ a sentence based on that clause.”).

6 I do not agree that “[a] *Johnson* movant has met his burden to show that he has a right to § 2255 relief ... unless the record affirmatively shows that the district court relied upon the ACCA’s elements clause.” App. Br. at 22. Instead, I simply take the view that an “unclear” sentencing record is neither a bar to, nor sufficient for, success on the merits of a *Johnson* claim.

7 They do, however, clarify that either direct or circumstantial evidence could be used for this purpose. See Maj. Op. n.4.

8 Since the majority finds that Beeman has not adequately established that he was sentenced under the residual clause, they do not address the question of whether his predicate offense of aggravated assault in Georgia could qualify him for an ACCA sentence under the language of the elements clause. As noted at the outset, this question was fully briefed by both Parties, who agree that the modified categorical approach is the proper standard here. Applying that standard to the Georgia statute, Beeman’s aggravated assault predicate likely would not qualify as a crime of violence under the elements clause.

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899 F.3d 1218

United States Court of Appeals, Eleventh Circuit.

Jeffrey Bernard BEEMAN, Petitioner-Appellant,

v.

UNITED STATES of America, Respondent-Appellee.

No. 16-16710

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Filed 08/14/2018

Attorneys and Law Firms

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Appeal from the United States District Court for the Northern District of Georgia, D.C. Docket No. 4:16-cv-00143-HLM

Before ED CARNES, Chief Judge, TJOFLET, MARCUS, WILSON, WILLIAM PRYOR, MARTIN, JORDAN, ROSENBAUM, JULIE CARNES*, JILL PRYOR, NEWSOM and BRANCH, Circuit Judges.

Opinion**BY THE COURT:**

A petition for rehearing having been filed and a member of this Court in active service having requested a poll on whether this case should be reheard by the Court sitting en banc, and a majority of the judges in active service on this Court having voted against granting a rehearing en banc, it is ORDERED that this case will not be reheard en banc.

JULIE CARNES, Circuit Judge, respecting the denial of rehearing en banc:

A majority of the Court has voted not to rehear en banc our decision in *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), in which the panel held that Beeman had failed to make the showing necessary to prevail on his 28 U.S.C. § 2255 motion for resentencing based on *Johnson v. United States*, 576 U.S. —, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). *Johnson* declared the residual clause of the

Armed Career Criminal Act (ACCA) unconstitutionally vague, meaning that this clause cannot be used as the basis for imposing an enhanced sentence under the ACCA. As the movant, a § 2255 litigant has always been required to shoulder the burden of proving his claim. That being so, *Beeman* held that a § 2255 litigant who seeks to overturn his sentence on the ground that he was sentenced pursuant to the residual clause must actually prove that his sentence was based on that clause: a requirement *1219 that the panel majority thought to be rather obvious and unremarkable.

Dissenting as to the denial of en banc review of *Beeman*, Judge Martin, however, disagrees that a § 2255 litigant who raises a *Johnson* claim should be held to such a burden. Instead, our dissenting colleague seeks a new rule that would exempt *Johnson* § 2255 claimants from the standard that is applied to all other § 2255 litigants. As the author of the *Beeman* decision, I write in response to our dissenting colleague's assertion that *Beeman* was wrongly decided.

I. Background

Following a search of his residence that uncovered, among other things, the presence of illegal drugs, drug paraphernalia, a rifle and pistol, and 31 rounds of ammunition, Jeffrey Beeman was convicted by a jury of cocaine possession with the intent to distribute and of being a felon in possession of a firearm and ammunition. The district court considered whether Beeman's sentence as to the firearm and ammunition charges should be enhanced pursuant to the ACCA: a statute that calls for a sentence of at least fifteen years for a defendant convicted of an applicable firearms offense who has at least three prior qualifying felony convictions for drug trafficking offenses and/or violent felonies. Beeman potentially had three such convictions: two prior drug trafficking convictions and a prior violent felony conviction. The latter was a conviction for aggravated assault under Georgia law after Beeman, armed with a shotgun, shot a person named Parrish Mitchell. The district court concluded that this aggravated assault conviction constituted a violent felony and that the prior drug trafficking convictions likewise qualified as ACCA-predicate crimes. The court therefore sentenced Beeman pursuant to the ACCA. Beeman offered no objection.

Beeman likewise did not appeal his sentence, which had been imposed in 2009, albeit he unsuccessfully appealed his conviction, which became final in 2010. Nevertheless, almost six years later, in 2016, he filed a § 2255 motion claiming that the district court had erred when it counted the aggravated assault conviction as a violent felony and sentenced him pursuant to the ACCA. Accordingly, he asked that his ACCA-sentence be vacated.

The ACCA provides three ways by which a prior conviction can qualify as a violent felony, only two of which are relevant here: the elements clause and the residual clause. The elements clause defines as a violent felony a crime that 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). The residual clause defines a violent felony as a crime that presents a serious potential risk of physical injury to another. *Id.* § 924(e)(2)(B)(ii). The presentence investigation report had recommended that a conviction for Georgia aggravated assault be considered a violent felony under the ACCA, but it did not specify on what clause or clauses that recommendation was based, nor did the district court so specify when it imposed sentence.

II. Beeman's *Descamps* Claim is Untimely

As noted, only two of the three clauses defining a violent felony were potentially applicable to Beeman's aggravated assault conviction: the elements clause and the residual clause. Accordingly, in his § 2255 motion, Beeman raised two separate claims in an effort to knock out each clause as a viable basis for characterizing the aggravated assault conviction as a violent felony: a *Descamps* claim challenging use of the elements clause and a *Johnson* *1220 claim challenging use of the residual clause. As to the former, he relied on the Supreme Court's decision in *Descamps v. United States*, 570 U.S. 254, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013), in which the Supreme Court clarified, among other things, that the modified categorical approach cannot be used to classify a conviction as being for a violent felony if the underlying statute is indivisible. Relying on the *Descamps* decision, which was issued subsequent to his sentencing, Beeman contended that the elements clause can now no longer support the characterization of his aggravated assault conviction as a violent felony. From this proposition, he argued that any use by the district court of that clause

when imposing his sentence was illegitimate, and thus his ACCA-sentence should be vacated.

Unfortunately for Beeman, his *Descamps* claim could not make it out of the starting gate because it was untimely. Holding that Beeman's claim for relief under § 2255 was time-barred to the extent it sought relief pursuant to *Descamps*, the panel opinion explained that Beeman had filed his § 2255 motion over five years after his judgment of conviction became final—an event that typically triggers the start date for AEDPA's one-year limitations period. *See Beeman*, 871 F.3d at 1220. This default limitations period may, however, be restarted and extended for a one-year period of time when the movant asserts a right that “has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.” 28 U.S.C. § 2255(f)(3). But *Descamps* “did not announce a new rule.” *Mays v. United States*, 817 F.3d 728, 734 (11th Cir. 2016) (explaining that *Descamps* “merely clarified existing precedent”). Moreover, even had it done so, Beeman did not file his § 2255 motion within one year of *Descamps*'s issuance in 2013.

In short, Beeman's *Descamps* claim being untimely, he cannot challenge in a § 2255 motion the validity of the elements clause as a basis for classifying his aggravated assault conviction as a violent felony.

III. Beeman Failed to Prove His *Johnson* Claim

Without a timely *Descamps* claim, the only route to relief for Beeman was a successful *Johnson* claim. The panel opinion concluded that Beeman had asserted a timely *Johnson* claim by alleging that the residual clause was an improper basis for determining whether a putative predicate conviction constitutes a violent felony and by filing his § 2255 motion within one year after *Johnson*'s issuance. *Beeman*, 871 F.3d at 1220–21. Unlike *Descamps*, the *Johnson* decision meets both requirements necessary to invoke a renewed limitations period under § 2255(f)(3): (1) *Johnson* announced a new rule and (2) the Supreme Court made the rule retroactively applicable to cases on collateral review. *See Welch v. United States*, 578 U.S. —, —, 136 S.Ct. 1257, 1264–65, 1268, 194 L.Ed.2d 387 (2016).

Although Beeman properly asserted a *Johnson* claim, the panel opinion concluded that he ultimately failed to prove the central allegation of this claim: that the residual clause

adversely impacted his sentence, which is an essential element of this particular § 2255 claim. That lapse was fatal. *Beeman*, 871 F.3d at 1221. In so holding, the panel began with the unremarkable principle that a § 2255 movant bears the burden of proof and persuasion as to the claims asserted in his § 2255 motion. *Id.* at 1221–22. Well-established by a long line of precedent cited in the panel’s decision, this principle protects finality interests that are “essential to the operation of our criminal justice system,” *1221 *Teague v. Lane*, 489 U.S. 288, 309, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and that are at the core of AEDPA. *See Jones v. United States*, 304 F.3d 1035, 1039 (11th Cir. 2002) (“A fundamental purpose for the AEDPA was to establish finality in post-conviction proceedings.”).

In the context of a *Johnson* claim, meeting the burden of proof necessary to warrant relief under § 2255 means showing, by a preponderance of the evidence, that the residual clause in fact adversely affected the movant’s sentence. *See In re Thomas*, 823 F.3d 1345, 1348 (11th Cir. 2016). In order to do that, the movant must prove that—more likely than not—he was sentenced based solely on the residual clause. If the movant’s sentence was based also, or instead, on the elements or the enumerated offenses clause (neither of which were called into question by *Johnson*), then one must necessarily conclude that the now-invalid residual clause did not adversely affect the sentence.

Beeman provided no evidence to meet his burden. He offered no reason why one should infer that the district court based its conclusion that the Georgia aggravated assault conviction qualified as a violent felony on the residual clause. Certainly, nothing in the sentencing record indicates that the district court, addressing an aggravated assault conviction arising out of Beeman’s shooting of another person, rejected—or even questioned—what would have appeared to be the obvious clause to use in first determining whether that conviction was a violent felony: the elements clause, which clause requires that the underlying crime have as an element the use, attempted use, or threatened use of physical force against another person.¹

Nor has Beeman shown that there is anything in the legal landscape in 2009 to suggest that the district court would have had any reason to doubt that the elements clause provided a sound basis for characterizing the aggravated

assault conviction as a violent felony. *See United States v. Washington*, 890 F.3d 891, 896 (10th Cir. 2018) (holding that a § 2255 movant bears the burden of proving that the sentencing court relied solely on the residual clause in order to succeed on a *Johnson* claim and noting that a reviewing court “can often determine whether the district court relied on the residual clause in sentencing by looking to ‘the relevant background legal environment that existed at the time of [the defendant’s] sentencing’ ” (alteration in original) (quoting *United States v. Snyder*, 871 F.3d 1122, 1130 (10th Cir. 2017))).

As to the legal landscape concerning a Georgia aggravated assault conviction at the time of Beeman’s 2009 sentencing under the ACCA, if the law was clear at the time of Beeman’s sentencing that only the residual clause would authorize a finding that his aggravated assault conviction was a violent felony, that circumstance would strongly indicate that an ACCA sentence based on such a conviction depended on the residual clause. Yet, Beeman has not cited, and the panel did not find, any caselaw in 2009 holding, otherwise making obvious, or even hinting that a Georgia aggravated assault conviction could qualify as *1222 a violent felony only under the residual clause.

In short, having offered no basis upon which to conclude that the district court counted the aggravated assault conviction as a violent felony based solely on the residual clause, Beeman clearly failed to shoulder his burden of proving that his sentence was adversely impacted by the residual clause. Having failed to carry his burden of proof on that claim, Beeman’s *Johnson* claim necessarily had to be dismissed. *See Romine v. Head*, 253 F.3d 1349, 1357 (11th Cir. 2001) (“Where, as here, the evidence does not clearly explain what happened ... the party with the burden loses.”); *see also Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005) (explaining that the term “burden of persuasion” means that the party with the burden “loses if the evidence is closely balanced”).

IV. Dissenting Colleague’s Concerns

Our dissenting colleague focuses on what she views as the unfairness of the result generated by the *Beeman* decision. Yet, she does not explain why the legal principles applied by the *Beeman* panel opinion are incorrect, nor does she engage the panel opinion’s legal analysis.

Contrary to our dissenting colleague's characterization, the burden of proof and persuasion that governs a § 2255 motion is not an "administrative impediment" that we may disregard when we find it to be inconvenient. See Judge Martin Dissent at 1224. Rather, and as the *Beeman* panel emphasized, "[t]he burden of proof and persuasion reflects longstanding and fundamental interests in finality." *Beeman*, 871 F.3d at 1223.

Nor does the *Beeman* panel's decision improperly create too "narrow" a "path" for obtaining relief under *Johnson*, as our colleague suggests. See Judge Martin Dissent at 1226–27. For sure, the panel decision requires a § 2255 movant asserting a *Johnson* claim to bear the same burden of proof and persuasion as any other § 2255 movant. But the opinion does not limit the type of evidence that a movant might seek to marshal. Indeed, there are numerous sources a movant might rely upon to meet this burden, including comments or findings by the sentencing judge, statements in the PSR, colloquy by counsel, concessions by the prosecutor, and caselaw in existence at the time of sentencing. See *Beeman*, 871 F.3d at 1224 n.4. As the panel explained, "[e]ach case must be judged on its own facts." *Id.* In this particular case, *Beeman* simply failed to show—by any of the methods suggested by the panel or by any other method²—that the sentencing court relied on the residual clause in applying the ACCA.

In determining whether a district court based its sentencing decision solely on the residual clause, our colleague would widen the path for a movant seeking *Johnson* relief by considering only whether a particular conviction would qualify today as an ACCA predicate under the enumerated offenses or the elements clause, given developments in the caselaw such as *Descamps*. See Judge Martin Dissent at 1227. If current law would forbid the use of the enumerated offenses or the elements clause, according to our colleague's reasoning, one would have to infer that the sentencing court necessarily relied only on the residual clause when it applied the ACCA enhancement. See *id.*

***1223** Yet, simply as a matter of logic, this approach is flawed because evidence of what a judge is allowed to do under current law does not answer the question of what the judge actually did at the time of the sentencing. To use this case as an example, even if we assume that it would be improper today, after the 2013 *Descamps* decision and

its progeny, to find that a Georgia aggravated assault conviction qualifies as a violent felony under the elements clause, that conclusion does not mean that the district court in 2009 was clairvoyant and, anticipating future caselaw, that it would have eliminated the elements clause as the basis for its determination that aggravated assault is a violent felony, instead defaulting to the residual clause.

But more fundamentally, our dissenting colleague's approach would let *Beeman*'s untimely claim for relief under *Descamps* in through the backdoor, thereby entirely neutering a ruling that any such claim is clearly barred by AEDPA's statute of limitations. Our colleague suggests that the panel somehow "ignored" *Descamps* by adhering to this statute of limitations ruling.³ Judge Martin Dissent at 1227. To the contrary, the panel acknowledged *Descamps*, as well as its retroactive application to cases on collateral review. See *Beeman*, 871 F.3d at 1219. But the fact that a particular legal principle is to be given retroactive effect does not necessarily mean that a claim based on that legal principle will be timely under AEDPA. As the panel opinion explained, *Descamps* does not reset AEDPA's statute of limitations pursuant to § 2255(f)(3), because *Descamps* does not set forth a "newly recognized" right. *Id.* at 1220. Further, *Beeman* filed his motion more than a year after *Descamps* was issued. In short, *Beeman* should not be allowed to obtain relief under § 2255 based on a purported *Johnson* claim that is nothing more than a thinly-disguised and untimely *Descamps* claim.

Essentially, what our colleague is advocating for in her dissent is that the burden of proof and persuasion that ordinarily applies to a § 2255 motion be relaxed when it comes to *Johnson* claims to ensure that more *Johnson* movants prevail on their claims. In support of her position, our colleague notes that sentencing courts have never been required to say, and as a result have not always expressly stated, which of the ACCA's clauses they are relying on when finding that a conviction qualifies as a violent felony. See Judge Martin Dissent at 1228–29. As a result, our colleague argues, if we treat *Johnson* movants like every other § 2255 movant, and require them to shoulder their burden of proof, it is unlikely that many of these prisoners will succeed in showing they are due relief.

Even accepting Judge Martin's factual premise about what sentencing records typically show or do not show, our panel opinion rejected her legal premise that the

burden of proof should be overhauled for *1224 the purpose of increasing the number of cases in which a movant prevails. The burden of proof reflects longstanding and fundamental interests in finality. It is by application of the appropriate burden that the outcome of a case is supposed to be determined, not the other way around. This approach is as true with *Johnson* as with any other type of claim. A § 2255 petitioner is not exempt from the requirement that he prove his sentence was imposed contrary to the Constitution simply because he has pled a *Johnson* claim.

For all of the above reasons, I remain convinced that the *Beeman* panel got the law right. To obtain relief on a *Johnson* claim, a § 2255 movant must prove by a preponderance of the evidence that the residual clause in fact adversely impacted his sentence. The movant cannot meet this burden by showing only that his qualifying convictions do not satisfy the elements clause or the enumerated offenses clause under the law as it stands today, because such a showing does not demonstrate that the sentencing court in fact relied on the residual clause when it imposed sentence. Rather, the movant must point to evidence in the record or to caselaw in existence at the time of the sentencing sufficient to show that—more likely than not—the sentencing court based its imposition of an ACCA-sentence on the residual clause. *Beeman* was true to applicable and long-standing legal principles, and I submit that it was correctly decided.

MARTIN, Circuit Judge, with whom JILL PRYOR, Circuit Judge joins, dissenting from the denial of rehearing en banc:

Jeffrey Bernard Beeman is serving a seventeen and one-half year term of imprisonment. His sentence was made longer because he was sentenced under the Armed Career Criminal Act (“ACCA”), a statute intended to impose harsher sentences on criminal defendants who committed violent felonies in the past. Since he was sentenced, the law defining what constitutes a “violent felony” has changed. Indeed, the U.S. Supreme Court invalidated part of the statute that had been the basis for his longer sentence, *Johnson v. United States*, 576 U.S. —, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). As a result, Mr. Beeman filed this action seeking to have his sentence vacated. He points out that a person with a background identical to his would get a significantly shorter sentence if sentenced today. However, the panel of this court that ruled on Mr.

Beeman’s appeal imposed administrative impediments, such that he can get no review of his sentence. Those impediments are not derived from the statute or Eleventh Circuit or Supreme Court precedent, and they bar relief for prisoners serving sentences that could not properly be imposed under current law. I hoped the majority of this Court would vacate the *Beeman* panel opinion, and I dissent from their decision to let it stand.

The panel opinion in Mr. Beeman’s case allows him no relief unless he can point to something from the transcript of his 2009 sentencing hearing that proves his longer sentence was based on the part of the statute, the residual clause, which was invalidated by the Supreme Court. Of course, at the time of Mr. Beeman’s sentencing hearing, no one who was there had any idea that the Armed Career Criminal Act would, six years later, be partly invalidated by the Supreme Court. Thus, the question presented by Mr. Beeman’s case is what opportunity, if any, do we give him (and many others like him) to have his sentence reevaluated now that the Supreme Court has recognized his sentence was imposed under a statute that was, in part, unconstitutional.

In her opinion respecting the denial of en banc review, Judge Julie Carnes says I *1225 “disagree” that litigants seeking habeas relief should be required to bear the burden of proving their case. Judge Carnes Op. at 1218–19. Not so. The burden belongs squarely on Mr. Beeman. My argument is that he has carried his burden.

Mr. Beeman came forward with proof that his sentence must have been based on the residual clause. That is, it can’t possibly be based on the other clauses in ACCA’s definition of “violent felony.” This Court has previously relied on precisely this type of process of elimination. See *In re Chance*, 831 F.3d 1335, 1339–41 (11th Cir. 2016); *In re Rogers*, 825 F.3d 1335, 1339 (11th Cir. 2016) (per curiam). Other circuits have as well. See *United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017); *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017). And Mr. Beeman is right when he tells us that his 1990 conviction in Georgia for aggravated assault is not an ACCA predicate offense under the enumerated offenses clause, one of the two surviving definitions of violent felony. Beyond that, and although this Court has not yet decided the issue, Mr. Beeman explains why his 1990 Georgia aggravated assault conviction cannot qualify as a violent felony under the last remaining definition either. This means the now defunct

residual clause provided the only basis for designating Mr. Beeman's aggravated assault conviction as a violent felony.

U.S. District Judge Kathleen Williams, sitting by designation with this court, dissented from the Beeman panel opinion, and explained well the reasons why the panel opinion was wrongly decided. I agree with what she said, and add my thoughts here.

I. BACKGROUND

A.

In 2009 Mr. Beeman was sentenced to a 210-month term of imprisonment after he was convicted for being a felon in possession of a firearm. Beeman v. United States, 871 F.3d 1215, 1217 (11th Cir. 2017). His ACCA sentence is based on two Georgia convictions for possession of cocaine with intent to distribute and one Georgia conviction for aggravated assault. Id. at 1218.

A felon-in-possession conviction carries a sentence of no more than ten years. 18 U.S.C. § 924(a)(2). ACCA adds a requirement for a sentence of no less than fifteen years for any felon in possession of a firearm who has been convicted of three or more crimes that meet the definition of a "violent felony" or a "serious drug offense." Id. § 924(e)(1). The statute gives three definitions of what can constitute a "violent felony." The first is known as the "elements clause," which includes any crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another." Id. § 924(e)(2)(B)(i). The second is the "enumerated offenses clause," which includes "burglary, arson, or extortion" and crimes that "involve[] use of explosives." Id. § 924(e)(2)(B)(ii). The third is known as the "residual clause," and it says violent felonies include crimes that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another." Id.

On June 26, 2015, the Supreme Court ruled the residual clause of ACCA was so vague that it could not serve as a constitutional basis for making a person's sentence longer. Johnson, 135 S.Ct. at 2563. The Supreme Court later held that Johnson's ruling should be given effect in cases where defendants were sentenced under the residual clause before Johnson was decided. Welch v United States,

518 U.S. —, 136 S.Ct. 1257, 1268, 194 L.Ed.2d 387 (2016). That being so, on June 7, 2016, Mr. Beeman filed a motion to vacate his sentence *1226 under 28 U.S.C. § 2255. Beeman, 871 F.3d at 1218. He argued that, after Johnson, his Georgia conviction for aggravated assault no longer qualified as an ACCA predicate offense. Id. Generally, he argued that a Georgia conviction for aggravated assault was not an enumerated offense; could not now be supported by the defunct residual clause; and did not qualify under the elements clause. Id.

The District Court found Mr. Beeman's motion was not based on Johnson, but actually relied on Descamps v. United States, 570 U.S. 254, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013). Beeman v. United States, No. 4:08-CR-038-01-HLM-WEJ, No. 4:16-CV-00143-HLM, 2016 WL 10571891, at *2 (N.D. Ga. Oct. 12, 2016). With this reasoning, it denied the § 2255 motion as untimely. Id. (citing 28 U.S.C. § 2255(f)). Mr. Beeman appealed.

B.

The panel characterized Mr. Beeman's motion as raising both a "Johnson claim and a Descamps claim."¹ Beeman, 871 F.3d at 1220. The panel said because Descamps did not state a new rule, a Descamps claim would not trigger the one-year limitations provision of 28 U.S.C. § 2255(f)(3), while a claim based on Johnson would. Id. at 1219–20. To distinguish between the two, the panel explained that "[a] Johnson claim contends that the defendant was sentenced as an armed career criminal under the residual clause, while a Descamps claim asserts that the defendant was incorrectly sentenced ... under [the other] clause[s]." Id. at 1220. The panel recognized that Mr. Beeman raised a timely Johnson claim because he argued that his offense "historically qualified as an ACCA predicate under the ACCA's residual clause," and because he filed his motion just before the one-year anniversary of the Johnson decision. Id. at 1220–21 (quotation omitted and alteration adopted).

Having decided Mr. Beeman's motion was timely, the panel then considered the merits of his "Johnson claim." Id. at 1221. But the panel rejected Mr. Beeman's effort to show that his aggravated assault conviction did not qualify as a violent felony under either ACCA's elements clause or its enumerated offenses clause. Instead the panel said he was entitled to no relief because he could not

affirmatively prove that the sentencing court relied “solely on the residual clause” when it imposed sentence on Mr. Beeman in 2009. *Id.* In creating this standard, the panel required Mr. Beeman to prove this “historical fact,” using only his 2009 sentencing record and legal precedent that predated that sentence. *Id.* at 1224 n.5. The panel said this test—the “historical-fact test”—was necessary to preserve the appropriate burden placed on § 2255 petitioners. *Id.* at 1221–24. Once the panel applied this historical-fact test to Mr. Beeman’s case, it denied his claim. *Id.* at 1224–25.

II. DISCUSSION

A.

How does a prisoner in the Eleventh Circuit get the benefit of a claim based on *Johnson*? The *Beeman* panel opinion created a very narrow path. Now a petitioner must show through affirmative record evidence—or precedent that was binding at the time of his sentencing—that the sentencing court gave him a longer sentence *1227 based only on the residual clause. *Id.* at 1221–22, 1224 n.5. But we know there are other ways to prove a *Johnson* claim. For example, if a person serving an ACCA sentence can show that his prior conviction could not qualify as a “violent felony” under either the enumerated offenses or the elements clauses of ACCA, the prior conviction must have been deemed a violent felony under the residual clause.

Here, the opinion respecting the denial of en banc review suggests that accepting this type of proof about how a particular sentence was imposed equals relieving a litigant of the burden of proving he’s entitled to relief. Judge Carnes Op. at 1223–24. But again, I have merely articulated the method by which Mr. Beeman has carried his burden. Certainly, the only other circuits to have considered this question at the time *Beeman* was decided accepted this same method of proof relied on by Mr. Beeman. See *Geozos*, 870 F.3d at 896; *Winston*, 850 F.3d at 682.²

This approach is reliable because our method for analyzing whether a conviction qualifies as a “violent felony” under the enumerated offenses and elements clauses has remained unchanged. *Descamps* reiterated that courts must apply the categorical approach to

analyzing ACCA predicates, or, in certain limited circumstances, use a modified-categorical approach. *Descamps*, 570 U.S. at 257, 133 S.Ct. at 2281; see also *Mays v. United States*, 817 F.3d 728, 734 (11th Cir. 2016) (per curiam) (“*Descamps* did not announce a new rule—its holding merely clarified existing precedent.”). So if you can show that a conviction does not meet the definition of a “violent felony” under the elements or enumerated offenses clauses, this is affirmative proof that the sentence was based on the now-defunct residual clause.

The panel rejected this approach, and in doing so ignored *Descamps*.³ The panel recognized that *Descamps* must be applied retroactively on collateral review, *Beeman*, 871 F.3d at 1219–20, but then refused to apply it as a part of the merits analysis, saying Mr. Beeman was “untimely” in asserting it, *id.* at 1220. But again, the Supreme Court opinion in *Descamps* instructed courts on how to analyze a person’s prior convictions to determine whether they meet the definition of a “violent felony” *1228 under ACCA. Every defendant is entitled to have the federal courts evaluate his sentence under the *Descamps* methodology, whether now or in the past, and whether in this Circuit or another. *Descamps* is binding Supreme Court precedent. The panel opinion made a mistake in ignoring it.

To the extent the panel’s designation of Mr. Beeman’s *Descamps* claim as “untimely” indicates a worry about a flood of untimely petitions, Mr. Beeman’s claim was timely. His claim is that *Johnson* means he no longer qualifies for an ACCA sentence, and AEDPA gives him one year from the date of that decision to make that claim. See 28 U.S.C. § 2255(f)(3). He met this deadline. The time limits set by 28 U.S.C. § 2255(f) work well enough.⁴ It is not the role of the courts to graft an additional test onto the merits analysis to keep out otherwise timely petitions.

It is important to examine what exactly is being rejected when this Court refuses to apply *Descamps* to a § 2255 claim. Mr. Beeman would like the opportunity to prove that his sentence was not based on the elements clause. But the panel is interested only in how the sentencing court understood ACCA in 2009. As *Descamps* explains, the rules for evaluating predicate offenses—other than under the residual clause—are the same today as they always have been. *Descamps*, 570 U.S. at 260, 263, 133 S.Ct. at 2283, 2285. If the sentencing court analyzed the elements

clause in a different way, the court was wrong.⁵ And the Beeman panel opinion binds all members of this Court to recreate and leave in place the misunderstandings of law that happened at sentencing. Ignoring for a moment that we must apply Supreme Court precedent, what is the value in binding ourselves to erroneous decisions?

We also know that Beeman's historical-fact test raises very real practical concerns. Most pre-Johnson sentencing records don't specify reliance on the residual clause because "[n]othing in the law requires a judge to specify which clause of [ACCA] ... it relied upon in imposing a sentence." Chance, 831 F.3d at 1340. A § 2255 claim under the Beeman rule thus now turns on whether the sentencing court happened to utter superfluous commentary at sentencing. This Court plainly identified this problem in Chance, which discussed two hypothetical defendants who were "sentenced on the same day, for the same offense, by the same judge, with the same *1229 ACCA predicates." Beeman, 871 F.3d at 1228–29 (Williams, J., dissenting) (citing Chance, 831 F.3d at 1341). The hypothetical judge specified for one defendant that the sentence was based on the residual clause, but was silent about the other. Id. Under the historical-fact test, one of those defendants gets relief and the other does not. And the resulting disparity means courts fall short in imposing like punishments on like wrongdoers.

In short, Mr. Beeman's method of proving his claim—showing that his sentence could not possibly be based on the elements clause or enumerated offenses clause—is rational, supported in law, embraced by this circuit and others, and a proper allocation of the burden for a § 2255 petitioner. It was error for the panel to reject it by creating a new test.

B.

Under a proper analysis, Mr. Beeman has a good argument that he should not have received an ACCA sentence, even at the time his sentence was imposed.

At the time of his 1990 conviction, a person could be convicted of aggravated assault in Georgia for using a dangerous object to put another person in "reasonable apprehension" of an immediate violent injury. See O.C.G.A. §§ 16-5-20(a), 16-5-21(a) (1990); Rhodes v. State, 257 Ga. 368, 359 S.E.2d 670, 672 (1987). As Georgia

courts have explained, "reasonable apprehension" is determined based solely on the victim's viewpoint, without regard to the defendant's intent. Dunagan v. State, 269 Ga. 590, 502 S.E.2d 726, 730 (1998) ("[A]n assault under [O.C.G.A. § 16-5-20(a)(2)] looks to the victim's state of mind, rather than the accused's, to establish the elements of an assault."), overruled on other grounds by Parker v. State, 270 Ga. 256, 507 S.E.2d 744, 747 (1998); see also Patterson v. State, 299 Ga. 491, 789 S.E.2d 175, 177 (2016) (affirming reliance on Dunagan). There need not be any intent to actually injure the victim, or even intent to place the victim in apprehension of an injury.⁶ See Adsitt v. State, 248 Ga. 237, 282 S.E.2d 305, 307–08 (1981); Collins v. State, 199 Ga.App. 676, 405 S.E.2d 892, 893 (1991); see also Newby v. State, 338 Ga.App. 588, 791 S.E.2d 92, 96 (2016). There also need not be any actual physical contact. Anderson v. State, 170 Ga.App. 634, 317 S.E.2d 877, 878 (1984) ("Physical contact is required for a simple battery but not for aggravated assault....").

Generally, offenses must require knowing or intentional conduct to qualify as a violent felony. See Begay v. United States, 553 U.S. 137, 144–45, 128 S.Ct. 1581, 1586, 170 L.Ed.2d 490 (2008) (holding that strict liability or negligence crimes only qualify as ACCA predicates when they involve "purposeful, violent, and aggressive" conduct), abrogated on other grounds by Johnson, 135 S.Ct. at 2563; Leocal v. Ashcroft, 543 U.S. 1, 5, 9–10, 125 S.Ct. 377, 380, 382, 160 L.Ed.2d 271 (2004) (holding that a DUI offense did not have "as an element the use, attempted use, or threatened use of physical force against the person or property of another" under the "crime of violence" definition of 18 U.S.C. § 16 because it could be committed negligently or accidentally). When a state crime sweeps broader than ACCA's definitions, *1230 that crime cannot categorically qualify as an ACCA predicate. See Taylor v. United States, 495 U.S. 575, 599–600, 110 S.Ct. 2143, 2158–59, 109 L.Ed.2d 607 (1990).

Mr. Beeman has a good argument that a Georgia conviction for aggravated assault did not require the type of intent necessary for it to serve as an ACCA predicate offense. He should have been given an opportunity to present that argument in court.

III. CONCLUSION

The Supreme Court recently reminded us of our crucial duty to “exhibit regard for fundamental rights and respect for prisoners as people.” Rosales-Mireles v. United States, 585 U.S. —, 138 S.Ct. 1897, 1907, — L.Ed.2d — (2018) (quotation omitted). This duty encompasses thorough review of sentences we now know are longer than the law permitted, because “[t]o a prisoner, th[e] prospect of additional time behind bars is not some theoretical or mathematical concept[;] ... [it] has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration.” Id. (quotations omitted and alterations adopted). When considering claims like Mr. Beeman’s, “what reasonable citizen wouldn’t bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?” Id. at 1908 (quotation omitted).

Mr. Beeman was sentenced in 2009. With a ten-year maximum sentence, he could be nearing his release date. Instead, he will spend another seven-and-a-half more years behind bars. And not only does this Court sanction his unconstitutional sentence, we will prevent him—and many other prisoners like him—from arguing the full merits of his case in court. Our Court is now daily presented with pleadings from prisoners who are barred from our Court because of the rule created in the Beeman panel opinion. In my view, it is the role of the courts to hear these claims. I therefore register my dissent about this court’s failure to do so.

All Citations

899 F.3d 1218 (Mem), 27 Fla. L. Weekly Fed. C 1171

Footnotes

- * En banc polls are conducted of the “circuit judges of the circuit who are in regular active service” who are not disqualified. 28 U.S.C. § 46(c); Federal Rule of Appellate Procedure 35(a). At the time the poll was conducted in this case, Judge Julie Carnes was in regular active service and participated in it. She took senior status on June 18, 2018, which was after the poll had been completed.
- 1 Indeed, the district judge who denied Beeman’s § 2255 motion is the same judge who sentenced him. In the part of his opinion addressing the merits of Beeman’s § 2255 motion, the judge indicated, as an alternative ground, that relief on the motion was not warranted because Georgia aggravated assault still qualifies as a violent felony under the elements clause of the ACCA, even under the more exacting analysis required by *Descamps* and its progeny. Given this post-*Descamps* analysis by the judge, it is unlikely that he would have relied solely on the residual clause in finding that Beeman’s Georgia aggravated assault conviction qualified as a violent felony when he sentenced Beeman pre-*Descamps* in 2009.
- 2 We noted in the panel opinion that the suggested methods of proof were just “a few examples” and that “there could be other circumstances on which a movant can rely” to prove he is entitled to relief under § 2255 pursuant to *Johnson*. *Beeman*, 871 F.3d at 1224 n.4.
- 3 Our colleague also argues that the panel’s statute of limitations ruling conflicts with our own precedent in *Mays v. United States*, 817 F.3d 728 (11th Cir. 2016). That is not so. The movant in *Mays* raised a claim to relief based on both *Descamps* and *Johnson* but, significantly, the timeliness of the *Descamps* claim was not at issue because the Government waived its statute of limitations defense. *Id.* at 732–33. Rather, the only question presented for decision in *Mays* was whether *Descamps* and *Johnson* applied retroactively in the post-conviction context. *Id.* *Mays* answered in the affirmative: a conclusion we readily accept. *See id.* at 733–34. The *Mays* court, however, did not confront—and made clear that it could not decide—a case in which the *Descamps* claim was untimely. *Beeman* did. Nothing in *Mays* considered or reached any conclusion that, in deciding the merits of a stand-alone *Johnson* claim, the habeas court must also reach out to make sure that the sentencing court complied with *Descamps*.
- 1 The Supreme Court did not create a new type of claim in *Descamps*. Instead, *Descamps* reiterated a framework the Supreme Court already instructed us to use to evaluate the criminal history of people being sentenced in federal court. *See Descamps*, 570 U.S. at 260, 263, 133 S.Ct. at 2283, 2285 (noting that prior caselaw “all but resolves this case” and that the Court was merely applying the modified-categorical approach in “the only way we have ever allowed”). More discussion on this subject will follow.
- 2 Since *Beeman* was decided, other courts have adopted the *Beeman* panel’s method, *see United States v. Washington*, 890 F.3d 891, 896 (10th Cir. 2018), *Potter v. United States*, 887 F.3d 785, 788 (6th Cir. 2018), *Dimott v. United States*,

881 F.3d 232, 240 (1st Cir. 2018), while the Fifth Circuit declined to adopt it, see United States v. Taylor, 873 F.3d 476, 481–82 (5th Cir. 2017). The circuits are therefore split on this question.

- 3 The panel opinion also ignored our own Circuit precedent from Mays. Courtney Mays, like Mr. Beeman, challenged his ACCA sentence, arguing his earlier conviction for third-degree burglary in Alabama no longer qualified as an ACCA predicate. Mays, 817 F.3d at 731–32. The Mays panel evaluated Mr. Mays's criminal history, using the Descamps methodology, and held that his third-degree burglary conviction did not qualify as a violent felony under either the enumerated offenses clause or the elements clause, and recognized that the residual clause could no longer be a basis for counting this conviction. Id. at 733–34. Based on this record, the Mays panel vacated Mr. Mays's sentence, and remanded him to be resentenced “without the § 924(e)(1) enhancement.” Id. at 737. Under Beeman's “historical-fact test,” Mr. Mays would not qualify for resentencing because our Court would be required to stand by the mistakes made by the District Court when it counted his third-degree burglary conviction as a violent felony and imposed the ACCA sentence. Thus, Mr. Mays would be serving a sentence based on this third-degree burglary conviction, even though this Court's post-Descamps evaluation of this crime taught us it did not meet the definition of a violent felony under ACCA. See United States v. Howard, 742 F.3d 1334, 1344–45 (11th Cir. 2014) (overturning United States v. Rainer, 616 F.3d 1212 (11th Cir. 2010)).
- 4 The opinion supporting the denial of rehearing en banc says it would “neuter[]” the statutory time limit to allow any discussion of Descamps “in through the backdoor.” Judge Carnes Op. at 1223. In my view, all I am trying to do is follow Supreme Court precedent. Descamps didn't just tell us whether a conviction under a particular state-statute qualified as an ACCA predicate offense. It discussed the methodology a court must employ to analyze such questions. See Descamps, 570 U.S. at 257–58, 133 S.Ct. at 2281–82. And the Supreme Court reminded lower courts this was the same standard that had always applied. See id. at 260, 263, 133 S.Ct. at 2283, 2285. By applying Descamps to all § 2255 challenges, a court is playing by the rules. Nothing about that constitutes sneaking something “in through the backdoor” of a § 2255 petition.
- 5 Judge Julie Carnes asserts a judge would have had to be “clairvoyant” in 2009 to interpret ACCA consistently with Descamps. See Judge Carnes Op. at 1223. But given that Descamps merely reiterated the same standard that had always been used to interpret ACCA, every judge in 2009 should have already been applying that standard. See United States v. Sneed, 600 F.3d 1326, 1330–33 (11th Cir. 2010) (discussing application of the modified categorical approach following the Supreme Court's 2005 decision in Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005)); see also, e.g., United States v. Robinson, 583 F.3d 1292, 1295–96 (11th Cir. 2009) (per curiam) (applying categorical approach consistent with Shepard); United States v. Burge, 407 F.3d 1183, 1187 (11th Cir. 2005) (same).
- 6 This distinguishes O.C.G.A. § 16-5-21 from aggravated assault under Florida law, which we have held qualifies as an ACCA predicate because it requires “an intentional, unlawful threat by word or act to do violence to the person of another.” Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, 1337–38 (11th Cir. 2013) (emphasis added), abrogated on other grounds by Johnson, 135 S.Ct. at 2563; see also United States v. Golden, 854 F.3d 1256, 1256–57 (11th Cir. 2017) (per curiam) (explaining that Turner's holding remained binding post-Johnson); id. at 1257 (Jill Pryor, J., concurring in result).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

JEFFREY BERNARD BEEMAN,

v.

CRIMINAL ACTION FILE
NO. 4:08-CR-038-01-HLM-
WEJ

CIVIL ACTION FILE
NO. 4:16-CV-0143-HLM

UNITED STATES OF AMERICA.

ORDER

This case is before the Court on Petitioner's Motion to Vacate, Set Aside, or Correct Sentence, which Petitioner filed under 28 U.S.C.A. § 2255 ("§ 2255 Motion") [102].

I. Background

On August 12, 2008, a federal grand jury sitting in the Northern District of Georgia returned an indictment against Petitioner. (Indictment (Docket Entry No. 1).) On January

27, 2009, the grand jury returned a first superseding indictment as to Petitioner. (First Superseding Indictment (Docket Entry No. 18).) On April 28, 2009, the grand jury returned a second superseding indictment as to Petitioner. (Docket Entry No. 41.) Count one of the second superseding indictment charged that, on or about December 7, 2007, Petitioner, having previously been convicted of three felony offenses, including aggravated assault and two cases involving possession of cocaine with the intent to distribute, knowingly possessed a firearm, in violation of 18 U.S.C. §§ 922(g) and 924(e). (Id. at 1.) Count two of the second superseding indictment charged Petitioner with knowingly and intentionally possessing with intent to distribute a mixture and substance containing a detectable amount of cocaine, in violation of 21 U.S.C. §§ 841(a)(1)

and (b)(1)(C). (Id. at 2.) Count three of the second superseding indictment charged Petitioner with knowingly possessing a firearm in furtherance of a drug trafficking crime, specifically, the offense alleged in count two, in violation of 18 U.S.C. § 924(c). (Id.) Count four of the second superseding indictment charged Petitioner with being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g) and 924(e). (Id. at 2-3.) The second superseding indictment also contained a forfeiture provision. (Id. at 3-4.)

Petitioner proceeded to a trial before a jury, which began on May 5, 2009. (Docket Entry Nos. 46, 48, 49.) The jury found Petitioner guilty of the charges contained in counts one, two, and four of the second superseding

indictment, but found Petitioner not guilty of count three. (Docket Entry Nos. 49, 55.)

On September 15, 2009, the Court sentenced Petitioner to 210 months of imprisonment on count one, to be followed by five years of supervised release, 210 months of imprisonment on count two, to be followed by three years of supervised release, to run concurrently with the sentence imposed on count one, and 210 months of imprisonment on count four, to run concurrently with the sentences imposed on counts one and two, for a total sentence of imprisonment of 210 months. (Docket Entry No. 71.) The Court provided that Petitioner's sentence in this action was to run concurrently with the sentence imposed on March 31, 2008, in the Superior Court of Polk County, Georgia, Case No. 99-CR-48. (Id.)

Petitioner appealed. (Docket Entry No. 73.) On July 8, 2010, the United States Court of Appeals for the Eleventh Circuit affirmed. (Docket Entry No. 86.)

On June 7, 2016, Petitioner, represented by counsel, filed his § 2255 Motion. (Docket Entry No. 102.) The briefing process for the § 2255 Motion is complete,¹ and the Court finds that the matter is ripe for resolution.²

¹Petitioner's § 2255 Motion, the Government's response to the § 2255 Motion, and Petitioner's reply in support of the § 2255 Motion all exceed the page limitations of the Local Rules. (See generally § 2255 Mot. (Docket Entry No. 102); Resp. § 2255 Mot. (Docket Entry No. 109); Reply Supp. § 2255 Mot. (Docket Entry No. 110).) The Court will accept all of those documents as filed, but instructs counsel to seek and obtain the Court's permission before filing briefs or motions that exceed the page limits set forth in the Local Rules. Including a request to exceed the page limits in the footnotes of a brief that exceeds the page limits is not, in the Court's view, the proper way to request permission to exceed the page limits. For all future filings, counsel must file a motion to exceed the page limits and wait until the Court grants the motion before filing a brief that exceeds the page limits.

²The Court finds that no evidentiary hearing is necessary. See Diaz v. United States, 930 F.2d 832, 843 (11th Cir. 1991) (noting that an evidentiary hearing is required in a federal habeas case

II. Discussion

Petitioner argues that, after Johnson v. United States, 135 S. Ct. 2551 (2015) (“Johnson”), his 151-month sentence of imprisonment, imposed under the Armed Career Criminal Act (the “ACCA”), is unlawful. (§ 2255 Mot. at 1.) Specifically, Petitioner contends that he “is no longer, by law, an armed career criminal because his conviction for aggravated assault no longer qualifies as an ACCA violent felony.”

A. Timeliness

The Government argues that Petitioner’s § 2255 Motion is untimely. (Resp. § 2255 Mot. (Docket Entry No. 109) at 6-10.) 28 U.S.C. § 2255(f) provides for a one-year limitation

only if the petitioner “alleges facts which, if proven, would entitle him to relief”).

period for § 2255 motions. 28 U.S.C. § 2255(f). Under § 2255(f):

The limitation period shall run from the latest of--

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Id.

“A conviction ordinarily becomes final when the opportunity for direct appeal of the judgment of conviction has been exhausted.” Akins v. United States, 204 F.3d 1086, 1089 n.1 (11th Cir. 2000). The Eleventh Circuit has explained “that a judgment of conviction becomes final within the meaning of § 2255 as follows: (1) if the prisoner files a timely petition for certiorari, the judgment becomes final on the date on which the Supreme Court issues a decision on the merits or denies certiorari, or (2) the judgment becomes final on the date on which the defendant’s time for filing such a petition expires.” Kaufmann v. United States, 282 F.3d 1336, 1339 (11th Cir. Feb. 21, 2002) (internal quotation marks omitted).

Here, the Eleventh Circuit decided Petitioner’s direct appeal on August 9, 2010, and the ninety-day period for

filing a petition for a writ of certiorari expired on November 7, 2010. The one-year limitations period for filing a § 2255 Motion ordinarily would have expired on November 7, 2011.

Petitioner contends that his § 2255 Motion is timely because he filed it within one year after the Supreme Court issued its decision in Johnson. The Court agrees with the Government that Petitioner's § 2255 Motion does not raise a Johnson claim. Rather, the § 2255 Motion, at its core, relies on Descamps v. United States, 133 S. Ct. 2276 (2013). Descamps was a decision based on statutory interpretation and did not create a new rule of constitutional law; rather, it was an interpretation of Taylor v. United States, 495 U.S. 575 (1990). See In re Griffin, 823 F.3d 1350, 1356 (11th Cir. 2016) ("Descamps is a rule of statutory interpretation, not constitutional law."). Even if

Descamps established a new rule, Petitioner would have been required to file his § 2255 Motion within one year after the Descamps decision, or by June 20, 2014.³ Petitioner failed to do so, and, as such, Petitioner's § 2255 Motion is untimely.⁴ See United States v. Carmichael, Criminal File No. 1:08-CR-403-TWT (N.D. Ga. Aug. 17, 2016), slip op. at 1-2 (noting that a § 2255 Motion arguing that the defendant's previous convictions for aggravated assault and criminal attempt to commit burglary no longer qualified as

³The Eleventh Circuit has found that Descamps is retroactive for purposes of a first § 2255 Motion, but that "Descamps did not announce a new rule of constitutional law" for purposes of filing a second or successive § 2255 motion under § 2255(h)(2). In re Griffin, 823 F.3d at 1356.

⁴The Court does not address the Government's contention that Petitioner's § 2255 Motion is procedurally barred, because the Court rejects the Motion as untimely and on its merits. (Resp. § 2255 Mot. at 11-13.) The Court thus need not, and does not, address Petitioner's arguments in his reply concerning procedural default, cause, and prejudice. (See generally Reply Supp. § 2255 Mot.)

violent felonies under the ACCA was “not a Johnson claim and it is barred by the one year time limitation of 28 U.S.C. § 2255(f)(1)” (unpublished); Neesmith v. United States, Case Nos. CV615-080, CR602-009, 2016 WL 1688780, at *1 n.3 (S.D. Ga. Apr. 26, 2016) (“Although true that Johnson is, as of April 18, 2016, retroactive to both first and second or successive § 2255 motions, [Petitioner’s] motion remains untimely if Johnson does not apply to his predicate convictions.” (citations omitted)); see also In re Hires, 825 F.3d 1297, 1303 (11th Cir. 2016) (“Johnson does not serve as a portal to assert a Descamps claim, such as a claim that Descamps precludes using the modified categorical approach on a robbery statute unless the statute is divisible, and thus convictions previously counted as predicate robberies under the elements clause no longer count under

that clause.”). Petitioner has not demonstrated that another provision of § 2255(f) applies or that he is entitled to equitable tolling. The Court therefore agrees with the Government that Petitioner’s § 2255 Motion is untimely. Alternatively, for the reasons set forth below, the Motion fails on its merits.

B. The Motion Fails on its Merits

1. The ACCA: In General

“Federal law forbids certain people—such as convicted felons, persons committed to mental institutions, and drug users—to ship possess, and receive firearms.” Johnson, 135 S. Ct. at 2555; see also 18 U.S.C. § 922(g) (making it unlawful for any person “who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year” to “possess in or affecting commerce,

any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce”). “In general, the law punishes violations of this ban by up to 10 years’ imprisonment.” Johnson, 135 S. Ct. at 2555; see also 18 U.S.C. § 924(a)(2) (providing that a person who “knowingly violates” § 922(g) “shall be fined as provided in this title, imprisoned not more than 10 years, or both”). “But if the violator has three or more earlier convictions for a ‘serious drug offense’ or a ‘violent felony,’ the [ACCA] increases his prison term to a minimum of 15 years and a maximum of life.” Johnson, 135 S. Ct. at 2555; see also 18 U.S.C. § 924(e)(1) (“In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent

felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years[.]”).

The ACCA states, in relevant part:

the term “violent felony” means any 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 phrase “otherwise involves conduct that presents a serious potential risk of physical injury to another,” id., has “come to be known as the

[ACCA's] residual clause.” Johnson, 135 S. Ct. at 2556. In Johnson, the Supreme Court found that the residual clause is void for vagueness, and that imposing an increased sentence under the residual clause violates due process. Id. at 2555-63. In Welch v. United States, 136 S. Ct. 1257 (2016), the Supreme Court concluded that Johnson announced a substantive rule that applied retroactively on collateral review. 136 S. Ct. at 1264-65.

Notably, the other provisions of the ACCA remain in effect after Johnson, and a predicate offense that qualifies as a violent felony under the other clauses of 18 U.S.C. § 924(e)(2)(B) is not affected by Johnson. See United States v. Tinker, 618 F. App'x 635, 637 (11th Cir. 2015) (“Tinker’s predicate offenses appear to qualify as violent felonies under the ‘elements’ clause in § 924(e)(2)(B)(i), rather than

the ‘residual’ clause in § 924(e)(2)(B)(ii), and thus Tinker’s classification as an armed career criminal does not appear to be affected by Johnson.”).

2. General Standards for Determining Whether a Prior Conviction Qualifies as a Predicate Conviction Under the ACCA

“The Supreme Court has developed two methods for determining whether a prior conviction [qualifies as a predicate conviction under the ACCA]: the categorical approach and the modified categorical approach.” United States v. Howard, 742 F.3d 1334, 1342 (11th Cir. 2014).

“The categorical approach is the more limited approach—‘limited’ in the sense that courts applying it ‘must look only to the statutory definitions of the prior offenses . . . and not to the particular facts underlying those convictions.’ Id. (alteration in original) (quoting Taylor, 495

U.S. at 600). “The modified categorical approach is less limited, but not unlimited.” Id. “It allows courts to look beyond the statute itself to a limited class of documents . . . to determine whether the prior conviction involved a determination that the defendant was guilty of each of the elements of the generic ACCA offense.” Id. In Shepard v. United States, 544 U.S. 13 (2005), the Supreme Court found that the inquiry that courts may conduct when determining whether a prior conviction qualifies as a predicate conviction under the ACCA “is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.” 544 U.S. at 26. Those documents are

commonly called “Shepard documents.” Howard, 742 F.3d at 1342.

The Supreme Court has held “that the modified categorical approach can be applied only when dealing with a divisible statute: a statute that ‘sets out one or more of the elements of the offense in the alternative.’” Howard, 742 F.3d at 1343 (quoting Descamps v. United States, 133 S. Ct. 2276, 2281-82 (2013)). That approach “should ‘focus on the elements, rather than the facts, of a crime.’” Id. at 1345 (quoting Descamps, 133 S. Ct. at 2285). “If the modified categorical approach does apply to a prior conviction, courts should use the Shepard documents to determine which statutory phrase the defendant was necessarily convicted under and then analyze whether that phrase matches the corresponding element of the generic offense.” Id.

If, however, “the statute under which the defendant was previously convicted is indivisible, the modified categorical approach is inapplicable” and “the Shepard documents are irrelevant to the ACCA issue.” Howard, 742 F.3d at 1345.

Under the categorical approach, in contrast, the Court “compare[s] only ‘the elements of the statute forming the basis of the defendant’s conviction’ and the elements of the generic offense.” Howard, 742 F.3d at 1345 (quoting Descamps, 133 S. Ct. at 2281). “If the statute criminalizes several acts, [the Court] must assume ‘that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense.’” Id. (quoting Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013)). “A conviction will qualify as an ACCA predicate

under the categorical approach ‘only if the statute’s elements are the same as, or narrower than, those of the generic offense.’” Id. (quoting Descamps, 133 S. Ct. at 2281). “If the statute is generic—if it requires that all of the elements of the generic ACCA crime be present before it is violated—all convictions under the statute necessarily count as ACCA predicates and there is no need for further analysis.” Id. “The modified categorical approach does not come into the picture when a statute criminalizes only categorically generic crimes; it is not needed.” Id.

If a statute is non-generic, then the Court “must determine whether it is divisible or indivisible.” Howard, 742 F.3d at 1345. Under Descamps, “a statute is divisible if it ‘sets out one or more elements of the offense in the alternative—for example, stating that burglary involves entry

into a building or an automobile.” Id. at 1345-46 (emphasis in original) (quoting Descamps, 133 S. Ct. at 2281). “By contrast, a statute is indivisible if it contains ‘a single, indivisible set of elements.’” Id. (quoting Descamps, 133 S. Ct. at 2282). “An example of an indivisible statute would be one that criminalizes assault ‘with a weapon,’ instead of criminalizing assault ‘with a gun, a knife, or an explosive.’” Id. (quoting Descamps, 133 S. Ct. at 2290). “If a statute is indivisible, a court may not apply the modified categorical approach, and that is the end of the inquiry; the prior conviction cannot qualify as an ACCA predicate regardless of what any Shepard documents may show.” Id.

“Descamps indicates that sentencing courts should usually be able to determine whether a statute is divisible by simply reading its text and asking if its elements or means

are ‘drafted in the alternative.’” Howard, 742 F.3d at 1356 (quoting Descamps, 133 S. Ct. at 2285 n.2). In this Circuit, sentencing courts conducting this analysis “are bound to follow any state court decisions that define or interpret the statute’s substantive elements because state law is what the state supreme court says it is.” Id.

“When a court does apply the modified categorical approach, the key is to ‘focus on the elements, rather than the facts,’ of the prior conviction.” Howard, 742 F.3d at 1347 (quoting Descamps, 133 S. Ct. at 2285). The modified categorical “approach allows a court to consider a limited class of court approved documents, including: ‘charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms.’”

Id. (quoting Johnson v. United States, 559 U.S. 133, 144 (2010) (“Johnson I”)). “A court must not, however, consult those documents ‘to discover what the defendant actually did’ and then compare that conduct to the elements of the generic offense.” Id. (quoting Descamps, 133 S. Ct. at 2287). Rather, the Court may examine the documents “only ‘to determine which statutory phrase,’ meaning which alternative element, ‘was the basis for the conviction.’” Id. (quoting Descamps, 133 S. Ct. at 2285). “If the Shepard documents show that the defendant was found guilty under elements of a divisible statute that match the generic offense, instead of those that do not, the prior conviction is an ACCA predicate.” Id. (footnote omitted).

The Supreme Court recently explained that, for purposes of the ACCA, “[e]lements are the constituent parts

of a crime’s legal definition—the things that the prosecution must prove to sustain a conviction.” Mathis v. United States, 136 S. Ct. 2243, 2248 (2016) (internal quotation marks and citation omitted). The Court concluded:

For more than 25 years, we have repeatedly made clear that application of ACCA involves, and involves only, comparing elements. Courts must ask whether the crime of conviction is the same as, or narrower than, the relevant generic offense. They may not ask whether the defendant’s conduct—his particular means of committing the crime—falls within the generic definition. And that rule does not change when a statute happens to list possible alternative means of commission: Whether or not made explicit, they remain what they ever were—just the facts, which ACCA (so we have held, over and over) does not care about.

Id. at 2257.

3. Application to this Case

Aggravated assault is not an enumerated felony under § 924(e)(2)(B)(ii). 18 U.S.C. § 924(e)(2)(B)(ii). Thus, for an

aggravated assault conviction to qualify as an ACCA predicate offense, it must do so under 18 U.S.C. § 924(e)(2)(B)(i), the elements clause, which requires that the offense have “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). For purposes of the elements clause, “the phrase ‘physical force’ means violent force, that is, force capable of causing physical pain or injury to another person.” Johnson I, 559 U.S. at 140 (emphasis in original).

The Georgia aggravated assault statute that was in effect at the time of Petitioner’s aggravated assault conviction provided:

- (a) A person commits the offense of aggravated assault when he assaults:

- (1) With intent to murder, rape, or to rob:
- (2) With a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury.

O.C.G.A. § 16-5-21(a). Under Georgia law:

- (a) A person commits the offense of simple assault when he or she either:
 - (1) Attempts to commit a violent injury to the person of another; or
 - (2) Commits an act which places another in reasonable apprehension of immediately receiving a violent injury.

O.C.G.A. § 16-5-20(a). “Aggravated assault has two elements: (1) commission of a simple assault as defined by O.C.G.A. § 16-5-20; and (2) the presence of one of three statutory aggravators.” Guyse v. State, 286 Ga. 574, 576,

690 S.E.2d 406, 409 (2010).⁵ As of 2010, those statutory aggravators were “(1) intent to rape, rob, or murder; (2) use of a deadly weapon or an offensive weapon likely to or actually resulting in serious bodily injury; and (3) shooting towards people from a vehicle without justification.” Id., id. It is abundantly clear that the elements of aggravated assault contemplate the use of force, and Petitioner’s previous aggravated assault conviction qualifies as a predicate offense for purposes of the ACCA. See Carmichael, slip op. at 1-2 (concluding that the petitioner’s previous convictions, including a conviction for aggravated assault under Georgia law “qualify as violent felonies because they involved the use or attempted use of force);

⁵In 2014, the Georgia General Assembly amended O.C.G.A. § 16-5-21(b) to add strangulation as an aggravator.

see also Hayward v. United States, Case Nos. CV416-111, CR408-203, 2016 WL 5030373, at *3 (S.D. Ga. Sept. 19, 2016) (finding that a petitioner's prior convictions for aggravated assault under O.C.G.A. § 16-5-21 "count as violent felonies under the ACCA's elements clause").

Here, simple assault, the first element of aggravated assault under Georgia law, can be committed in two ways: (1) by attempting to commit a violent injury to the person of another or (2) by committing an act that places another in reasonable apprehension of immediately receiving a violent injury. O.C.G.A. § 16-5-20(a). "It is not necessary that an indictment charging a defendant with aggravated assault specify the manner in which the simple assault was committed." Chase v. State, 277 Ga. 636, 638, 592 S.E.2d 656, 658 (2004). Thus, the Court agrees with the

Government that the simple assault alternatives are means of committing that crime. Mathis v. United States, No. 15-6092, 2016 WL 3434400, at *11 (U.S. June 23, 2016).

Both means of committing simple assault necessarily involve the use of force. By its terms, attempting to commit a violent injury involves the use, attempted use, or threatened use of physical force. See Guyse v. State, 286 Ga. 574, 577, 690 S.E.2d 406, 409 (2010) (noting that the first form of simple assault “is a specific intent crime requiring proof that the defendant intended to violently injury someone”). “[T]he second form of simple assault is a general intent crime.” Id., id. To show that a defendant committed aggravated assault in a crime involving the second form of simple assault, however, the government must show that the simple assault occurred in conjunction

with one of the four aggravators listed in the statute. Those aggravators necessarily require an intent to threaten or use force that is capable of causing injury. See United States v. Silva, 608 F.3d 663, 670-71 (10th Cir. 2010) (“Applying Johnson, we conclude that ‘apprehension causing’ aggravated assault in New Mexico includes as an element the threatened use of force capable of causing physical pain or injury to another person. Threatening or engaging in menacing conduct toward a victim, with a weapon capable of producing death or great bodily harm, threatens the use of violent force because by committing such an act, the aggressor communicates to his victim that he will potentially use violent force against the victim in the near-future. Additionally, ‘apprehension causing’ aggravated assault threatens the use of violent force because the proscribed

conduct always has the potential to lead to violent force.”
(emphasis in original) (some internal quotation marks and
citation omitted).

Further, the second element of aggravated assault, the
statutory aggravators, necessarily involves the use,
attempted use, or threatened use of physical force, and also
satisfies the elements clause. The first alternative, to
assault “[w]ith intent to murder, to rape, or to rob,” by its
plain terms, involves the use or threatened use of physical
force. O.C.G.A. § 16-5-21(b)(1). The second alternative,
which applies to an assault “[w]ith a deadly weapon or with
any object, device, or instrument which, when used
offensively against a person, is likely to or actually does
result in serious bodily injury,” also necessarily involves the
use or threatened use of physical force. O.C.G.A. § 16-5-

21(b)(2). The third alternative, which applies to assaults that occur “without legal justification by discharging a firearm from within a motor vehicle toward a person or persons,” by its plain terms, also involves the use or threatened use of physical force. O.C.G.A. § 16-5-21(b)(4). All of the three aggravating factors in effect at the time of Petitioner’s aggravated assault conviction necessarily involved violent force, or the threat of violent force, capable of causing physical pain or injury. Each of the aggravating factors thus satisfy the ACCA’s physical force requirement, and an aggravated assault under Georgia law falls within the ACCA’s elements clause.

Because Petitioner’s prior aggravated assault conviction qualifies under the ACCA’s elements clause, Petitioner has no Johnson claim and Descamps does not

apply. Hayward, 2016 WL 5030373, at *3. Likewise, Petitioner's "claim that the Georgia aggravated assault offense is not a 'generic' offense is not applicable because aggravated assault is not an enumerated offense" for purposes of the ACCA. Carmichael, slip op. at 2.⁶

⁶Even if the Court applied the modified categorical approach here, the Shepherd documents likely would demonstrate that Petitioner's prior aggravated assault conviction was for aggravated assault with a deadly weapon. The presentence investigation report ("PSR") provided that Petitioner's aggravated assault conviction was for shooting a man. Petitioner did not object to that portion of the PSR, and he admitted it for sentencing purposes. See United States v. Wade, 458 F.3d 1273, 1277 (11th Cir. 2006) ("It is the law of this circuit that a failure to object to allegations of fact in a [PSR] admits those facts for sentencing purposes."); United States v. Shelton, 400 F.3d 1325, 1330 (11th Cir. 2005) (noting that a defendant admitted the facts in a PSR by failing to raise an objection at sentencing). Aggravated assault under the deadly weapon provision of O.C.G.A. § 16-5-21(b)(2) necessarily qualifies as a crime of violence because it requires that the assault involve the use of force that "is likely to or actually does result in serious bodily injury." O.C.G.A. § 16-5-21(b)(2); see also Jefferson v. United States, Criminal Action No. 1:09-cr-324-WSD, Civil Action No. 1:13-cv-525-WSD, 2015 WL 6449230, at *4 (N.D. Ga. Oct. 23, 2015) (finding that the offense of aggravated assault under the deadly weapon provision "qualifies as a crime of violence because it involves the use, attempted use, or threatened use of physical

In sum, the Court concludes that Petitioner's previous Georgia aggravated assault conviction qualifies as a predicate offense for purposes of the ACCA under the elements clause, § 924(e)(2)(B)(i). The Court cannot grant relief to Petitioner under § 2255 based on Petitioner's contention that his aggravated assault conviction was not a crime of violence for purposes of the ACCA.

D. Summary

In sum, Petitioner's § 2255 Motion is time-barred. Alternatively, the Court finds that Petitioner's previous aggravated assault conviction still qualifies as a predicate offense under the ACCA's elements, or use of force, clause. As such, Petitioner's sentence does not run afoul of the due process clause, and he is not entitled to relief based on his _____ force against the person of another" (footnotes omitted)).

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The Court, however, will issue a certificate of appealability to Petitioner. 28 U.S.C. § 2253(c)(2) provides that a court should issue a certificate of appealability “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). A substantial showing of the denial of a constitutional right “includes showing that reasonable jurists could debate whether (or, for that matter, agree that), the [§ 2255 Motion] should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” Slack v. McDaniel, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). First, the Court finds that the timeliness issue is debatable among jurists of reason. Second, whether the Georgia aggravated assault

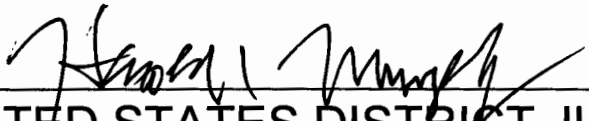
conviction qualifies as a predicate offense under the elements clause also is debatable among jurists of reason. The Court therefore will issue a certificate of appealability on those two issues.

III. Conclusion

ACCORDINGLY, the Court **DENIES** Petitioner's § 2255 Motion [102]. The Court **ISSUES** a certificate of appealability on two issues: (1) whether the one-year limitations period for filing a § 2255 Motion bars Petitioner's § 2255 Motion; and (2) whether, after Johnson, Petitioner's Georgia aggravated assault conviction qualifies as a predicate offense for purposes of the Armed Career Criminal Act's elements clause. The Court **DIRECTS** the Clerk to **CLOSE** the civil case associated with Petitioner's

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IT IS SO ORDERED, this the 1st day of October, 2016.


UNITED STATES DISTRICT JUDGE