APPENDIX

TABLE OF APPENDICES

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12492-B

CHRISTOPHER BROOKS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Christopher Brooks is a federal prisoner serving a 180-month sentence after pleading guilty to possession of a firearm by a convicted felon. He seeks a certificate of appealability ("COA") on the issue of whether the district court erred in denying his 28 U.S.C. § 2255 motion to vacate his sentence.

As background, at the time of Brooks's sentencing, he had prior Florida convictions for aggravated assault, attempted first-degree murder, and possession of cocaine with intent to deliver. Based on these convictions, his sentence was enhanced under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). After the Supreme Court rendered its decision in *Johnson v. United States*, 135 S. Ct. 2251 (2015), holding that the residual clause of the ACCA was unconstitutionally vague, Brooks filed the instant § 2255 motion, arguing that he no longer

qualified for an enhanced sentence, as his prior convictions for aggravated assault and attempted first-degree murder no longer constituted violent felonies.

The district court initially denied the motion as untimely, and alternatively determined that it was without merit. However, this Court reversed, concluding that the motion was indeed timely, and remanded for further consideration of the merits in light of its decision in *Beeman v. United States*, 871 F.3d 1215, 1221-22 (11th Cir. 2017), which held that, to prove a *Johnson* 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." On remand, the district court concluded that Brooks had failed to make the requisite showing that the sentencing court relied upon the residual clause in applying the ACCA enhancement and, therefore, could not state a valid claim based on *Johnson*. The court also denied Brooks a COA.

In order to obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation omitted).

Here, regardless of whether the district court was correct in its conclusion that Brooks's § 2255 motion failed under *Beeman*, he is not entitled to a COA, as binding precedent forecloses his arguments that his convictions for aggravated assault and attempted first-degree murder do not constitute violent felonies under the elements clause of the ACCA. *See In re Hires*, 825 F.3d 1297, 1301 (11th Cir. 2016) (stating that Florida aggravated assault is a violent felony under the elements clause); *Hylor v. United States*, No. 17-10856, ms. op. at 2 (11th Cir. July 18, 2018) (holding that Florida attempted first-degree murder is a violent felony under the elements

clause); *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) ("[N]o COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law."). Accordingly, his motion for a COA is DENIED.

UNITED STATES CIRCUIT JUDGE

.U.NITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CHRISTOPHER BROOKS,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

CASE NO. 16-61390-CIV-DIMITROULEAS
(10-60277-CR-DIMITROULEAS)

FINAL JUDGMENT AND ORDER DENYING MOTION TO CORRECT

THIS CAUSE is before the Court on Movant's *pro se* June 24, 2016 Motion to Correct Sentence [DE-1], and the Eleventh Circuit Court of Appeals' March 16, 2018 Mandate to Remand [DE-11]. The Court has reviewed the Court file and Pre-Sentence Investigation Report (PSIR), the Government's April 10, 2018 Response [DE-16], and defense counsel's April 18, 2018 Reply [DE-17] and having presided over this cause, finds as follows:

1. Brooks was charged by Indictment on October 28, 2010 with Possession of a Firearm by a Convicted Felon. [CR-DE-8]. The crime occurred on October 20, 2010.

2. On January 18, 2011, this Court denied a Motion to Suppress [CR-DE-31].

3. On January 21, 2011, Books filed a conditional plea of guilty, reserving his right to appeal the denial of the motion to suppress [CR-DE-32], pursuant to a Plea Agreement. [CR-DE_33]. Brooks understood that there was a fifteen (15) year mandatory minimum. [CR-DE-45, p. 14].

4. On March 16, 2011, Brooks filed an objection to being classified as an Armed Career Criminal because convictions had been imposed on the same date. [CR-DE-36].

5. On April 1, 2011, Brooks was sentenced to the mandatory minimum under the ACCA: fifteen (15) years. [CR-DE-38, 41]. Brooks objected to scoring both paragraph 30 (Possession of Cocaine with Intent to Deliver) and paragraph 31 (Aggravated Assault) because concurrent sentences were imposed.

[CR-DE-46, p. 4]. The objection was overruled. There was no objection to the underlying facts on any convictions. Those facts are deemed admitted for sentencing purposes. *U.S. v. Bennett*, 472 F. 3d 825, 833-34 (11th Cir. 2006).

6. On November 22, 2011, the Eleventh Circuit Court of Appeal affirmed. [CR-DE-56-1]. *U.S. v. Brooks*, 448 Fed. Appx. 27 (11th Cir. 2011). The only issue raised on appeal was the denial of a motion to suppress. Mandate issued on December 21, 2011. On March 19, 2012, the U.S. Supreme Court denied certiorari. [CR-DE-58]. *Brooks v. U.S.,* 132 S. Ct. 1779 (2012).

7. In this timely[1] Motion to Correct, Brooks contends that his ACCA classification is no longer valid under *Johnson v. U.S.*, 135 S. Ct. 2551 (2015). Brooks criticizes his prior convictions for Aggravated Assault (paragraph 31 of PSIR) and Attempted First Degree Murder (paragraph 29 of PSIR).

8. On June 27, 2016, this court found that Aggravated Assault qualifies as a predicate crime under the elements clause of the ACCA. *Turner v. Warden,* 709 F. 3d 1328, 1338 (11th Cir. 2013) *abrogated on other grounds by Johnson*. *Turner* is binding precedent in this circuit. *In re: Rogers*, 825 F. 3d. 1335, 1341 (11th Cir. 2016); *U.S. v. Deshazior,* 882 F. 3d 1352, 1355 (11th Cir. 2018). The Court also found that Attempted First Degree Murder also qualifies. This court went on to say that "Unless and until the Eleventh Circuit or the Supreme Court say First Degree Murder is not necessarily a crime of violence, this Court will continue to treat it as such." [DE-4, p. 2]. The Court denied relief on June 27, 2016. [DE-4].

9. On January 22, 2008, the Eleventh Circuit found that Brooks ' Motion to Vacate was timely and remanded for this Court's consideration of *Beeman v. U.S.*, 871 F. 3d 1215 (11th Cir. 2017). [DE-11]. *Brooks v. U.S.*, 2018 WL 496844 (11th Cir. 2018). The court has considered the transcripts in this case [DE-45, 46] and agrees with both parties that the transcripts are silent as to whether the predicate convictions were considered to be under the elements or residual clause of the ACCA.

[1] Timely because the Eleventh Circuit has so held.

10. The Court agrees with the Governments analysis. Brooks has not shown that this Court relied upon the residual clause when sentence was imposed under the ACCA in 2011.[2] It also would seem that this complaint was procedurally defaulted. Actual innocence does not equal legal innocence. *Johnson v. Alabama,* 256 F. 3d 1156, 1171 (11th Cir. 2001); *Hamm v. U.S.,* 2017 WL 3582793*3 (M.D. Fla. 2017) *appeal dism.*, Hamm v. U.S., 2018 WL 1580359 (11th Cir. 2018)..

11. The admitted facts in the PSIR show that both the Aggravated Assault and Attempted First Degree Murder convictions have as an element, the use, attempted use, or threatened use of violent physical force. Paragraph 31 of the PSIR indicates that Brooks retrieved a handgun and threatened to kill the victim. Paragraph 29 of the PSIR indicates that Brooks shot the victim in the chest. Brooks' failure to object to the PSIR admits facts for sentencing purposes. *U.S. v. Bennett*, 472 F. 3d 825, 833-34 (11th Cir. 2006); *U.S. v. Espinoza*, 651 Fed. Appx. 898 (11th Cir. 2016). In 2011, if an issue arose regarding a predicate crime for ACCA, this Court would have viewed the PSIR to have supported an elements clause interpretation of the ACCA in 2011, particularly before *Descamps v. U.S.*, 570 U.S. 254 (2013) was decided. Here, the question of applicability of a predicate crime was never raised before this court. Brooks has not satisfied his burden of proving the historical fact that the court relied on the residual clause in 2011 to enhance his sentence. Where the evidence does not clearly show what happened, Movant, with the burden of proof, loses. *Perez v. U.S.,* 2018 WL 1750555 (11th Cir. 2018).

Wherefore, Brooks' Motion to Correct /Vacate [DE-1] is Denied.

The Clerk shall close this case and deny any pending motions as Moot.

[2] The Arizona aggravated assault statute, construed in *U.S. v. Palomino Garcia*, 608 F. 3d 1317, 1333-34, 1337 (11th Cir. 2010), would have been viewed by this Court as dissimilar to the Florida Aggravated Assault statute in 2011, as the Arizona statute allows a conviction for recklessly causing injury. In 2011, it was highly likely that this court would have considered the Florida Aggravated Assault statute to have been a specific intent crime. *See, Swift v. State,* 973 So. 2d 1196, 1199 (Fla. 2nd DCA 2008) *but see, Cambell v. State, 37 So. 3d 948 (Fla. 5th DCA 2010).* In any event, it would seem that *Palomino Garcia* was not on this court's radar in 2011 or anyone else's radar involved in the case. What clause of ACCA was involved was not an issue; it was assumed that Aggravated Assault and Attempted First degree Murder were predicate crimes in 2011, as they are assumed to be again today.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 18th day of April, 2018.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Andrew Adler, AFPD

Mark Dispoto, AUSA