

APPENDICES

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-14430
Non-Argument Calendar
D.C. Docket Nos. 6:16-cv-01143-JA-KRS,
6:05-00144-JA-KRS-1

JAMES AVERY, JR.,
Petitioner-Appellant,
versus

UNITED STATES OF AMERICA,
Respondent-Appellee.

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

(June 30, 2020)

Before JORDAN, JILL PRYOR and NEWSOM, Cir-
cuit Judges.

PER CURIAM:

James Avery, Jr., a federal prisoner, appeals the district court's denial of his 28 U.S.C. § 2255 motion to vacate, which he filed after this Court granted him authorization to file a second or successive such motion. Avery argues that the district court erred in concluding that he was ineligible for relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015), from his Armed Ca-

reer Criminal Act (“ACCA”) sentence. After careful review, we affirm.¹

I. BACKGROUND

A jury convicted Avery in 2005 of knowingly possessing a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g). Avery’s presentence investigation report (“PSR”) recommended that he receive an enhanced sentence under ACCA. ACCA requires a minimum 15-year prison sentence whenever a § 922(g) defendant has three prior “violent felony” or serious drug convictions. *See* 18 U.S.C. § 924(e). (Otherwise, the maximum sentence for a § 922(g) offense is 10 years.) Avery’s PSR listed, among others, convictions in 1978 for Georgia armed robbery, Georgia robbery, and Georgia burglary, and in 1987 for Florida armed burglary and robbery with a firearm, committed on the same occasion. The PSR did not, however, specify which of Avery’s prior convictions it relied on in determining that he was subject to the ACCA enhancement.

At the time of Avery’s sentencing, ACCA provided three definitions of “violent felony.” The “elements clause” covered any offense 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 next subsection in the statute contained the other two definitions. *See id.* § 924(e)(2)(B)(ii). That subsection defined “violent felony” as any offense that “is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” The first 9 words made up the

¹ Avery’s motion for substitution of counsel is DENIED.

“enumerated crimes clause,” and the last 15 comprised the catchall “residual clause.” The enumerated crimes clause encompassed (and still encompasses) only “generic” versions of the listed offenses—that is, offenses comporting with the way “in which the term [*i.e.*, burglary] is now used in the criminal codes of most [s]tates.” *Taylor v. United States*, 495 U.S. 575, 598 (1990). Avery’s PSR did not specify which ACCA clause or clauses supported the enhancement.

Avery objected to the ACCA enhancement on the ground that the government had failed to prove he was the person who committed the crimes listed in the PSR. At sentencing, the district court admitted certified copies of records of several of Avery’s convictions—so-called *Shepard* documents²—including, as relevant to this appeal, his 1978 Georgia armed robbery conviction. The government also presented extensive testimony and numerous exhibits demonstrating that Avery was the person who committed the crimes listed in the PSR’s criminal history section.

The district court overruled Avery’s objections, adopted the PSR, and imposed the ACCA enhancement. The court stated that the enhancement was based on the Georgia robbery and armed robbery convictions and the Florida armed burglary conviction.³ The court did not specifically discuss which “violent felony” definition encompassed these convictions. The court sentenced Avery to 210 months’ imprisonment.

² See *Shepard v. United States*, 544 U.S. 13, 26 (2005).

³ The district court erroneously stated that this burglary conviction was from Georgia, but there is no dispute that it is from Florida.

Avery appealed, challenging his ACCA conviction on the basis that the district court erred by applying it based on prior convictions that were neither admitted nor proven to a jury beyond a reasonable doubt. This Court rejected Avery's arguments on appeal. See *United States v. Avery*, 205 F. App'x 819, 820, 825-26 (11th Cir. 2006) (unpublished).

After Avery's first § 2255 motion—which involved claims not related to the one at issue here—was rejected, the Supreme Court decided *Johnson*, in which it struck down ACCA's residual clause definition of “violent felony” as unconstitutionally vague. 135 S. Ct. at 2557, 2563; see also *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016) (explaining that *Johnson*'s holding is retroactively applicable to cases on collateral review). Avery sought authorization in this Court to file a second or successive § 2255 motion based on *Johnson*. See 28 U.S.C. § 2244(b)(3). We granted him that authorization, and he filed his motion to vacate in the district court. In support of that motion, Avery argued that it was more likely than not that the sentencing court relied on ACCA's residual clause when determining that his Georgia robbery and armed robbery and Florida armed burglary convictions were ACCA predicate offenses. He also argued that under this Court's precedent, see *United States v. Canty*, 570 F.3d 1251 (11th Cir. 2009), the government had waived reliance on any of his other prior convictions to support the ACCA enhancement.

The government opposed Avery's motion. As relevant to this appeal,⁴ the government argued that this

⁴ The government also argued that Avery had procedurally defaulted his *Johnson* claim by failing to challenge the validity of ACCA's residual clause during his sentencing and on direct appeal,

Court's decision in *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), precluded Avery's claim. In *Beeman*, which was decided during Avery's § 2255 proceedings in the district court, this Court held that a § 2255 movant has the burden of proving a *Johnson* claim by showing that (1) the sentencing court "relied solely on the residual clause" in imposing the ACCA enhancement and (2) "there were not at least three other prior convictions that could have qualified under either" of ACCA's other clauses as a violent felony, or as a serious drug offense. *Id.* at 1221. The "key question" is the "historical fact" of whether the defendant was "sentenced solely per the residual clause." *Id.* at 1224 n.5. The government argued that Avery failed to prove either of these elements. First, it argued, the record was silent as to which ACCA clause the sentencing court relied on. Second, the government asserted, six of Avery's prior convictions qualified as ACCA predicates post-*Johnson*.

The district court denied Avery's motion. The district court found that Avery had failed to satisfy either of *Beeman*'s two requirements. Specifically, the court determined that Avery had at least three qualifying predicate convictions under portions of ACCA's violent felony definition unaffected by *Johnson*, rejecting Avery's argument that *Canty* prevented the government's reliance on alternate predicate offenses. These valid predicates, the court found, included his Florida robbery with a firearm conviction, his Georgia armed robbery conviction, and his Georgia burglary conviction.

and that he could not show cause and prejudice to overcome the default. The district court did not decide Avery's motion on procedural default grounds, and we need not do so either because Avery's claim for relief fails on the merits.

tion. Only the second of these was expressly determined to be an ACCA predicate at Avery's sentencing.

Avery appealed, and this Court granted him a certificate of appealability on whether he met his burden to demonstrate entitlement to relief under *Johnson*.

II. STANDARD OF REVIEW

In reviewing the district court's denial of a § 2255 motion, we review *de novo* the court's legal conclusions and review for clear error the court's factual findings. *Spencer v. United States*, 773 F.3d 1132, 1137 (11th Cir. 2014) (en banc).

III. DISCUSSION

Avery challenges the district court's denial of his motion, arguing that he satisfied both prongs of *Beeman*. First, he argues that he met his burden to show it is more likely than not that the sentencing court relied solely on ACCA's residual clause when determining that his Florida armed burglary conviction was a violent felony. Second, he contends that none of his other prior convictions qualify under any still-valid ACCA "violent felony" definition. He argues that the district court erred in concluding that his Georgia armed robbery and burglary convictions qualified as ACCA predicates notwithstanding *Johnson*.⁵ Because we disagree with Avery's second argument, we conclude that he failed to satisfy *Beeman*, and we do not address his first argument.

⁵ This Court has rejected Avery's argument that the government waives reliance on other prior convictions to support the ACCA by failing to raise them at sentencing. See *Tribue v. United States*, 929 F.3d 1326, 1332 (11th Cir. 2019).

As a preliminary matter, Avery acknowledges that any challenge to the district court’s conclusion that his Florida robbery with a firearm conviction qualifies as an ACCA predicate even after *Johnson* is foreclosed by Supreme Court precedent. See *Stokeling v. United States*, 139 S. Ct. 544 (2019). We therefore do not address that conviction further. As to the burglary conviction, Avery argues that the Georgia statute criminalizing burglary in effect in 1978 when he was arrested did not require the use, attempted use, or threatened use of physical force—and so could not qualify under ACCA’s elements clause—and was categorically too broad to satisfy the definition of burglary as enumerated in ACCA. Avery’s argument is foreclosed by this Court’s decision in *United States v. Gundy*, 842 F.3d 1156 (11th Cir. 2016), which held that a virtually identical later version of Georgia’s burglary statute qualified as a predicate under ACCA’s enumerated crimes clause. In *Gundy*, this Court held that Georgia’s burglary statute, though broader than the generic definition of burglary, sets out separate crimes based on the location the defendant entered (a dwelling, building, railroad car, vehicle, or watercraft), some of which qualify as ACCA predicates. *Id.* at 1167-68.⁶ Avery does not dispute that the burglary of which he was convicted involved burglary of a “building[] housing a business,” which, this Court held in *Gundy*, satisfies ACCA’s definition. *Id.* at 1168-69. Thus, Avery has not demonstrated that the district court erred in concluding that

⁶ We acknowledge that the Fourth Circuit recently disagreed with *Gundy* and held that Georgia’s burglary statute is categorically overbroad and therefore not a valid ACCA predicate. See *United States v. Cornette*, 932 F.3d 204, 213-15 & n.2 (4th Cir. 2019). We, of course, are bound to follow *Gundy*. See *United States v. Brown*, 342 F.3d 1245, 1246 (11th Cir. 2003).

his Georgia burglary conviction qualified as an ACCA predicate notwithstanding *Johnson*.

That leaves Avery's Georgia armed robbery conviction. Avery acknowledges that the statute under which he was convicted delineates a series of separate robbery crimes, including robbery by intimidation. *See Holcomb v. State*, 198 S.E.2d 179, 180 (Ga. 1973) (citing 1968 Ga. Laws 1249). And the charging document, which the government introduced into evidence without objection at sentencing, demonstrated that Avery committed robbery by intimidation. Robbery by intimidation requires the threatened use of physical force and therefore satisfies ACCA's elements clause. *See In re Sams*, 830 F.3d 1234, 1239 (11th Cir. 2016) (construing the federal bank robbery statute, 18 U.S.C. § 2113(a)). Avery's Georgia robbery conviction thus qualifies as a predicate under ACCA's elements clause, and the district court did not err in relying on it.

Even assuming Avery satisfied *Beeman's* first prong, he failed to meet his burden to show that he lacked at least three prior convictions that qualified as ACCA predicates notwithstanding *Johnson*. *See Beeman*, 871 F.3d at 1221. He therefore is not entitled to relief on his § 2255 motion. *See id.*

IV. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No: 6:16-cv-1143-Orl-28KRS

JAMES AVERY, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Filed August 21, 2018

OPINION AND ORDER

This case is before the Court on Petitioner James Avery, Jr.'s ("Petitioner's" or "Avery's") Successive Motion to Vacate, Set Aside, or Correct an Illegal Sentence pursuant to 28 U.S.C. § 2255 and supporting memorandum of law (Doc. 1; Doc. 12). As the sole ground for relief in his successive § 2255 motion, Avery asserts that he was sentenced under the residual clause of the Armed Career Criminal Act in violation of *Johnson v. United States*, 135 S. Ct. 2551 (2015).

The Government filed a response to the § 2255 motion (Doc. 19). Avery filed a reply (Doc. 25). Thereafter, at this Court's direction, Avery filed a supplemental memorandum (Doc. 29), and Respondent filed a supplemental response (Doc. 31). For the following reasons, the Court concludes that Avery is not entitled to relief.

I. BACKGROUND AND PROCEDURAL HISTORY

On August 30, 2005, a grand jury returned a one-count indictment alleging that Avery was a convicted felon in possession of a firearm and an armed career criminal, in violation of 18 U.S.C. §§ 922(g)(1) and 924(c) (Cr. Doc. 1).⁷ The indictment listed four prior felonies that qualified Avery as an armed career criminal:

On December 11, 1987, a conviction for **Armed Burglary, Grand Theft of a Firearm, Robbery with a Firearm, and Grand Theft of Property**, in the Circuit Court, Eighteenth Judicial Circuit, in and for Brevard County, Florida, Case Number 87-3216-CF-A;

⁷ Federal law prohibits convicted felons from shipping, possessing, or receiving firearms in or affecting interstate commerce. 18 U.S.C. § 922(g)(1). Ordinarily, an individual who violates this prohibition faces a statutory maximum sentence of ten years' imprisonment. 18 U.S.C. § 924(a). However, a statutory provision known as the "Armed Career Criminal Act" or "ACCA" imposes a higher mandatory minimum term of imprisonment for certain offenders. Any person who violates Section 922(g) and has on three or more occasions been convicted for a "serious drug offense" or "violent felony" will receive a mandatory minimum sentence of fifteen years' imprisonment. 18 U.S.C. § 924(e)(1).

When Petitioner was sentenced in 2005, the ACCA defined a violent felony as any crime punishable by imprisonment for a term exceeding one year that: (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another"; (2) "is burglary, arson, or extortion, involves use of explosives"; or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another." § 924(e)(2)(B). These definitions of violent felony fall into three respective categories: (1) the elements clause; (2) the enumerated-offenses clause; and (3) the now-void residual clause. *See In re Sams*, 830 F.3d 1234, 1236-37 (11th Cir. 2016).

On February 20, 1978, a conviction for **Armed Robbery**, in the Superior Court, in and for Fulton County, Georgia, Case Number A-38641;

On February 20, 1978, a conviction for **Robbery**, in the Superior Court, in and for Fulton County, Georgia, Case Number A-38642; and

On February 20, 1978, a conviction for **Burglary**, in the Superior Court, in and for Fulton County, Georgia, Case Number A-38643.

(*Id.* at 1-2) (emphases in original). A jury convicted Avery as charged (Cr. Doc. 58).

Prior to Avery's sentencing hearing, the United States Probation Office prepared a Pre-Sentence Investigation Report ("PSI") that set forth a lengthy list of Avery's prior criminal convictions (PSI at ¶¶ 39-63). In addition to the four prior qualifying violent felonies set forth in the indictment, the PSI also listed two Alabama second-degree burglary convictions as qualifying predicates (*Id.* at ¶¶ 39, 42). The Probation Office recommended that Avery be sentenced as an armed career criminal (*Id.* at ¶ 27). Avery objected to the armed career criminal designation because "[h]e believe[d] that there [was] insufficient proof to prove [the underlying] convictions by way of appropriate court records being fingerprint records from the state of Alabama and the state of Georgia." (Cr. Doc. 88 at 5). Specifically, he urged that, for each ACCA-qualifying conviction, his identity needed to be proven to a jury beyond a reasonable doubt (*Id.* at 7).

After hearing the evidence and arguments advanced by the parties, the Court overruled Avery's identity-based objections, concluding that the government proved his convictions by a preponderance of the

evidence (Cr. Doc. 89 at 27). The Court found that Avery qualified for an enhanced sentence, specifying that “the convictions that qualify [for an enhancement] are listed in the presentence report at paragraphs 43, 44 and 46.” (*Id.*)⁸ The Court made no further findings as to whether Avery’s other convictions also qualified under the ACCA. The Court sentenced Avery as an armed career criminal to 210 months in prison (*Id.* at 29). The Eleventh Circuit affirmed Avery’s conviction and sentence. *United States v. Avery*, 205 F. App’x 819 (11th Cir. 2006).

Avery’s first 28 U.S.C. § 2255 motion was denied on April 2, 2010 (Cr. Doc. 103). Subsequently, on June 26, 2015, the United States Supreme Court decided *Johnson v. United States*. In *Johnson*, the Supreme Court held that “imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution’s guarantee of due process[.]” 135 S. Ct. at 1563. Thus, the Court struck down that portion of the ACCA. However, the Court also emphasized that its “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.” *Id.* Thereafter, the Supreme Court held that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1264-65 (2016). On June 20, 2016, the Eleventh Circuit Court of Appeals determined that Avery had made a *prima facie* showing that he falls within the scope of Johnson’s new substantive

⁸ These corresponded to Georgia state convictions for armed robbery and robbery, and a Florida conviction for armed robbery (Cr. Doc. 89 at 27-28; PSI at ¶¶ 43, 44, 46).

rule, and he was granted leave to file a second 28 U.S.C. § 2255 motion (Cr. Doc. 108).

On June 25, 2016, Avery filed the instant § 2255 motion, and on May 10, 2017, he filed a memorandum in support of the motion (Doc. 1; Doc. 16). In Avery's supporting memorandum, he argued that his prior convictions did not qualify under the elements or enumerated clauses of the ACCA (Doc. 16). Specifically, Avery urged that his 1972 and 1974 Alabama second-degree burglary convictions did not meet the elements clause of the ACCA and also did not fall under the enumerated clause because "Alabama law defined second-degree burglary more broadly than the *Taylor* generic burglary definition." (*Id.* at 12). He also urged that Florida armed robbery did not qualify as a violent felony under the ACCA, despite binding Eleventh Circuit precedent holding otherwise (*Id.* at 16). Next, Avery argued that a 1977 Georgia burglary conviction no longer qualified as a violent felony under the ACCA because "Georgia burglary is non-generic and indivisible as to the type of structure." (*Id.* at 27). Finally, Avery urged that his 1977 Georgia convictions for robbery and armed robbery and 1987 Florida conviction for armed burglary no longer qualified as violent felonies under the ACCA (*Id.* at 32-35). In making his arguments, Avery relied heavily on the Supreme Court's 2013 decision in *Descamps v. United States*, 570 U.S. 254 (2013).

Upon review of Avery's § 2255 motion and supporting memorandum and in light the intervening Eleventh Circuit opinion in *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), this Court asked Avery to explain how his successive § 2255 motion fell within the purview of *Johnson*. The Court noted that:

Beeman involved a successive § 2255 motion that, like the instant § 2255 motion, purported to rely on *Johnson v. United States*, 135 S. Ct. 2551 (2015), but was dismissed because the district court found it was actually based on *Descamps v. United States*, 570 U.S. 254 (2013). *Beeman*, 871 F.3d at 1218-19. The *Beeman* panel clarified that a claim based on *Descamps* would not trigger the one-year limitations provision of 28 U.S.C. § 2255(£)(3), but a claim based on *Johnson* would. *Id.* at 1220. 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.*

The *Beeman* decision requires this Court to determine whether Petitioner’s § 2255 motion raises a *Johnson* claim or a *Descamps* claim. Therefore, the Court must evaluate whether Petitioner “contends that [he] was sentenced ... under the [ACCA’s] residual clause.” *Beeman*, 871 F .3d at 1220. Petitioner bears the burden of establishing” that his sentence enhancement turned on the validity of the residual clause. In other words, he must show that the clause actually adversely affected the sentence he received.” *Id.* at 1221.

...

In his memorandum in support of his § 2255 motion, Petitioner relies heavily on the decision in *Descamps* and appears to argue that he was

sentenced based on crimes that no longer qualify as violent felonies. (Doc. 16 at 2, 14, 18, 24, 30, 31, and 35). However, that argument goes to whether the sentencing court correctly relied on the enumerated crimes provision—not to whether it relied on the residual clause. Petitioner cannot rely on *Descamps* in a second or successive § 2255 motion. See *In re Thomas*, 823 F.3d 1345, 1349 (2016) (concluding that *Descamps* did not announce a new rule of constitutional law as required under § 2255); *In re Hires*, 825 F.3d 1297, 1303 (11th Cir. 2016) (“*Descamps* is not retroactive for purposes of a second or successive § 2255 motion.”).

(Doc. 26). Avery was directed to file a supplemental memorandum (*Id.*).

In his supplemental memorandum, Avery conceded that *Beeman*, if followed, precluded relief on his claim, but urged that the case was incorrectly decided (Doc. 29 at 5).⁹ Avery further urged this Court to make a finding that it had relied on the ACCA’s residual clause to sentence him and to consider only a subset of his prior convictions as potential predicate felonies (*Id.*).

II. ANALYSIS

Though the Eleventh Circuit made a preliminary determination that Avery raised a *prima facie Johnson* claim, this was only a “threshold determination,” and “does not conclusively resolve” whether his § 2255 motion actually satisfies the requirements of § 2255(h)(2) (Cr. Doc. 108). This Court must still play a gatekeeping

⁹ On August 14, 2018, the Eleventh Circuit voted against granting a rehearing en banc on *Beeman*. *Beeman v. United States*, No. 16-16710, 2018 WL 3853960 (11th Cir. Aug. 14, 2018).

role and determine whether Avery's successive § 2255 motion is based upon "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." *See* § 2255(h)2); *In re Chance*, 831 F.3d 1335, 1338 (11th Cir. 2016). In other words, because Avery attempts to overcome § 2255(h)'s successive bar by contending that his motion is based on "a new [retroactive] rule of constitutional law," he must show that his enhanced sentence was implemented under the ACCA's residual clause.

a. Avery has not demonstrated that the Court relied on the residual clause to sentence him as an armed career criminal

Nothing in the record prior to Avery's sentencing hearing, in the sentencing hearing itself, or in the proceedings following Avery's sentencing hearing establishes (or even suggests) that this Court relied upon the ACCA's residual clause when enhancing Avery's sentence. *See Beeman*, 871 F.3d at 1221-22 ("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."). Avery has not cited, and this Court has not found, any 2005 (or earlier) caselaw holding or making it obvious that a majority of his prior convictions qualified as violent felonies only under the ACCA's residual clause. *See Beeman*, 871 F.3d at 1214 (noting that *Beeman* "has pointed to no precedent in 2009 holding, or otherwise making obvious, that [his prior conviction] qualified as a violent felony only under the residual clause."). Moreover, this Court does not find that it relied on the ACCA's residual clause when sentencing Avery.

A § 2255 movant cannot sustain his burden under *Johnson* by demonstrating that it is "merely possible

that the court relied on [the residual clause] to enhance the sentence.” *Beeman*, 871 F.3d at 1221. Here the record is silent, and “where ... the evidence does not clearly explain what happened[,] ... the party with the burden loses.” *Id.* at 1225 (quoting *Romine v. Head*, 253 F.3d 1349, 1357 (11th Cir. 2001)). As a result, Avery’s successive § 2255 motion collapses under the holding in *Beeman*.

b. Avery qualifies as an armed career criminal under the ACCA

Avery has sufficient qualifying predicate convictions under non-residual portions of the ACCA’s violent felony definition to qualify as an armed career criminal.¹⁰ First, Avery’s 1987 Florida conviction for robbery with a firearm, is a violent felony under the ACCA’s elements clause because it has “as an element the use, attempted use, or threatened use of physical force against the person or property of another.” 18 U.S.C. § 924(e)(2)(B)(i). *See United States v. Fritts*, 841 F.3d 937, 944 (11th Cir. 2016) (recognizing that Eleventh Circuit precedent and Florida Supreme Court opinions establish that a pre-1997 Florida conviction for armed

¹⁰ Six potentially qualifying violent felonies were listed in Avery’s PSI, and four qualifying violent offenses were listed in his indictment. However, the Court specifically stated at sentencing that it relied on Avery’s prior convictions for Georgia robbery, Georgia burglary, and Florida armed robbery to qualify him as an armed career criminal. Although Petitioner asserts otherwise, this Court is not precluded from considering all of the qualifying violent felonies listed in the PSI. Unlike the situation in *United States v. Canty*, 570 F.3d 1251 (11th Cir. 2009)—the case on which Petitioner relies—the government did not waive its reliance on the facts set forth in the PSI, and, in fact, spent considerable effort to show that Petitioner had been convicted of the predicate violent felonies (Cr. Doc. Nos. 88, 89); *See also United States v. Martinez*, 606 F.3d 1303 (11th Cir. 2010) (limiting *Canty* to its specific facts).

robbery qualifies as a violent felony under the ACCA's elements clause); *United States v. Seabrooks*, 839 F.3d 1326 (11th Cir. 2016); *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011); *United States v. Dowd*, 451 F.3d 1244 (11th Cir. 2006).

Second, Avery's 1978 Georgia conviction for armed robbery also qualifies as a predicate violent felony under the elements clause of the ACCA. Avery asserts that, at the time of his offense, the Georgia armed robbery statute provided that:

A person commits armed robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another by the use of an offensive weapon.

(Doc. 16 at 33) (citing Code Ann. S. 26-1902 (Ga. L. 1968, ¶. 1249, 1298; 1969, p. 810; 1976, p. 1359)). Georgia courts define an "offensive weapon" as "any object, device, or instrument which when used offensively against a person is likely to or actually does result in death or serious bodily injury." *Jackson v. State*, 545 S.E.2d 148, 151 (Ga. App. 2001) (citing Georgia pattern jury instructions). Use of an "offensive weapon" in robbery then necessarily requires at least a threat of violent physical force. *See Sheely v. State*, 650 S.E.2d 762,764 (Ga. App. 2007) ("[A] person commits the offense of armed robbery when, with intent to commit theft, he or she takes property of another from the person or the immediate presence of another by use of an offensive weapon. The element of use is present when the victim is aware of the weapon and it has the desired forceful effect of assisting to accomplish the robbery." (internal quotations omitted)); cf. *Hicks v. State*, 207 S.E.2d 30, 37 (Ga. 1974) (reversing armed robbery con-

viction for taking billfold from sleeping victim, ruling the statute “clearly contemplates that the offensive weapon be used as a concomitant to a taking which involves the use of actual force or intimidation (constructive force) against another person”). Because the use of the “offensive weapon” must induce the victim to relinquish possession, Georgia’s armed robbery statute 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). Avery committed the 1977 Georgia armed robbery by using a pistol to take a wallet containing \$295.00 from the victim (Doc. 19-6 at 2; PSI at ¶ 43). Therefore, the Court agrees with Respondent’s argument that Avery’s 1978 Georgia conviction for armed robbery is a qualifying conviction for enhancement under the elements clause of the ACCA. *See Walker v. United States*, No. CV 316-052, 2017 WL 967369 (S.D. Ga. Mar. 10, 2017) (holding that Georgia armed robbery is a violent felony under the elements clause of the ACCA); *Jackson v. United States*, No. 3:16-cv-101-TCB, 2017 WL 9617005 (N.D. Ga. Oct. 16, 2017) (concluding that “armed robbery as defined by Georgia’s statute qualifies as a predicate offense under the ACCA’s elements clause”).

Finally, Avery’s 1978 Georgia conviction for burglary, in which Avery and an accomplice were convicted of entering a building and liquor storage room with the intent to commit theft (Doc. 19-8 at 3; PSI at ¶ 45), qualifies as a violent felony under the ACCA’s enumerated-offenses clause. *See United States v. Adams*, 91 F.3d 114, 116 (11th Cir. 1996) (holding that the defendant’s prior convictions under Georgia’s non-generic burglary statute resulted from generic burglaries and, thus, constituted burglaries under § 924(e)); *United States v. Cheney*, 392 F. App’x 790, 793 (11th Cir. 2010)

(because the PSI and the indictments for the defendant's prior Georgia burglary conviction showed that the defendant was charged with and found guilty of breaking into a residence with intent to commit theft, his convictions under Georgia's non-generic burglary statute were properly considered violent felonies under the ACCA); *United States v. Gundy*, 842 F.3d 1156 (11th Cir. 2016) (same).

Because Avery has three qualifying felonies under non-residual portions of the ACCA, this Court declines to consider the thornier issues of whether his Alabama burglary convictions or Georgia robbery conviction also qualified as ACCA violent felonies at the time of Avery's sentencing hearing.

III. CONCLUSION

Avery has not demonstrated that his designation as an armed career criminal turned on the validity of the residual clause. In addition, he had at least three qualifying violent felonies under other portions of the ACCA. To the extent Avery argues that his convictions no longer qualify as violent felonies under the elements or enumerated clauses of the ACCA, this is a claim pursuant to *Descamps v. United States*. See *Beeman*, 871 F.3d at 1220 (“a *Descamps* claim asserts that the defendant was incorrectly sentenced as an armed career criminal under the elements or enumerated offenses clause.”). *Descamps* is not retroactive for purposes of a second or successive § 2255 motion. *In re Hires*, 825 F.3d 1297, 1303 (11th Cir. 2016). Thus, Avery is not entitled to relief pursuant to *Descamps*. See *Oxner v. United States*, No. 16-17036, 2017 WL 6603584, at *3 (11th Cir. 2017) (“[A] *Descamps* claim cannot be raised in a second or successive § 2255 motion.”).

Avery has not met the statutory criteria of 28 U.S.C. § 2255(h) because the new rule of constitutional law made retroactive by the Supreme Court in *Johnson* does not apply to him, and his successive § 2255 motion is dismissed.

Accordingly, it is hereby **ORDERED AND ADJUDGED**:

1. Avery's Successive Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (Doc. 1) is **DISMISSED**.

2. The Clerk of the Court shall enter judgment accordingly and is directed to close this case.

3. The Clerk of the Court is directed to file a copy of this Order in criminal case number 6:05-cr-144-Orl-28KRS.

4. This Court should grant an application for certificate of appealability only if the Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner has failed to make a substantial showing of the denial of a constitutional right.¹¹ Accordingly, a Certificate of Appealability is **DENIED** in this case.

DONE and **ORDERED** in Orlando, Florida on August 21, 2018.

¹¹ Pursuant to the *Rules Governing Section 2255 Proceedings for the United States District Court*, "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." *Rules Governing Section 2255 Proceedings for the United States District Courts*, Rule 11(a).

22a

/s/ John Anton II
JOHN ANTON II
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record
Unrepresented Parties
SA: OrIP-4

APPENDIX C

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 924(e)

* * *

(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, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term “serious drug offense” means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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; and

(C) the term “conviction” includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

* * *

GA CODE § 26-1601 (1977)

§ 26-1601. Burglary

A person commits burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another or any building, vehicle, railroad car, aircraft, watercraft, or other such structure designed for use as the dwelling of another, or enters or remains within any other building, railroad car, aircraft or any room or any part thereof. A person convicted of burglary shall be punished by imprisonment for not less than one nor more than 20 years.