APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10044

D.C. Docket Nos. 6:16-cv-01132-GKS-DCI; 6:12-cr-00312-GKS-DAB-1

ANTHONY MARVIN BRUTEN,

Petitioner - Appellant

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

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

(May 14, 2020)

Before JILL PRYOR and GRANT, Circuit Judges, and ROYAL,* District Judge.

PER CURIAM:

Anthony Marvin Bruten, a federal prisoner, appeals the district court's denial of his 28 U.S.C. § 2255 motion to vacate his sentence. This Court granted Bruten a certificate of appealability on one issue: whether the district court erred in dismissing Bruten's motion as procedurally barred by concluding that the government could rely on prior convictions in the Presentence Investigation Report ("PSR") as predicate offenses under the Armed Career Criminal Act ("ACCA"), despite the fact that neither the PSR nor the sentencing court explicitly found those other convictions to be ACCA predicates. After careful review, with the benefit of oral argument, and because of this Court's decision in *Tribue v. United States*, 929 F.3d 1326 (11th Cir. 2019), we affirm.

I. BACKGROUND

Bruten pled guilty pursuant to a plea agreement to possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1).[1] The plea agreement stated:

---

* Honorable C. Ashley Royal, United States District Judge for the Middle District of Georgia, sitting by designation.

[1] Because we write for the parties, who are familiar with the facts, we recount only the facts that are necessary to understand our disposition of this appeal.

> BRUTEN admits he has been convicted of the following felonies, which include three felonies that BRUTEN admits qualify him as an Armed Career Criminal:
>
> 1. Sale of Cocaine, in . . . Florida . . . , on or about August 17, 2011;
>
> 2. Flee or Attempt to Elude, in . . . Florida . . . , on or about November 10, 2009;
>
> 3. Sale or Possession of Cocaine with Intent to Sell within 1000 Feet of a School, in . . . Florida . . . ; and
>
> 4. Aggravated Assault, in . . . Florida . . . , on or about November 4, 2004.

Crim. Doc. 35 at 21.[2]

In preparation for sentencing, the probation office prepared a PSR. The PSR stated that Bruten was subject to an enhanced sentence under ACCA because he had "at least three prior convictions for a violent felony or serious drug offense, or both, that were committed on occasions different from one another." PSR at ¶ 23; *see* 18 U.S.C. § 924(e)(1). The PSR specifically listed three qualifying convictions: (1) aggravated assault in 2004; (2) sale/possession of cocaine within 1,000 feet of a school in 2005; and (3) fleeing and eluding in 2009. The PSR listed (and assigned criminal history points to) several other Florida convictions in the

[2] Citations to "Crim. Doc. #" refer to numbered entries on the district court's docket in Bruten's Middle District of Florida criminal case, No. 6:12-cr-312-GKS-DAB-1. The Presentence Investigation Report prepared in this case is cited as "PSR."

Citations to "Civ. Doc. #" refer to numbered entries on the district court's docket in Bruten's Middle District of Florida § 2255 proceedings.

criminal history section, including: sale/delivery of a controlled substance (cocaine) in 1998; manufacture of cocaine in 2004; and sale of cocaine within 1,000 feet of a public park in 2009.

Neither Bruten nor the government objected to the convictions listed in the PSR, which the district court adopted. At sentencing, the district court found that the ACCA enhancement applied, but did not state which of Bruten's convictions formed the basis of the enhancement. The district court sentenced Bruten to 180 months' imprisonment.

Bruten did not file a direct appeal. Rather, he filed the instant § 2255 motion to vacate. In his motion, Bruten argued that his ACCA-enhanced sentence was unconstitutional under *Johnson v. United States*, 135 S. Ct. 2551 (2015). ACCA provides for an enhanced sentence if a person convicted of a § 922(g) offense previously has been convicted of three "violent felon[ies]," "serious drug offense[s]," or both. *See* 18 U.S.C. § 924(e)(1). In *Johnson*, the Supreme Court held that one of the "violent felony" definitions, the "residual clause," was unconstitutionally vague in violation of due process. 135 S. Ct. at 2557. After *Johnson* a violent felony is "any crime punishable by imprisonment for a term exceeding one year" that either (1) "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 "elements clause," or (2) "is burglary, arson, or extortion,

[or] involves use of explosives," *id.* § 924(e)(2)(B)(ii), the "enumerated crimes clause." "Serious drug offense," unaffected by *Johnson*, means either any offense under the Controlled Substances Act or similar federal law or "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), for which a maximum term of imprisonment of ten years or more is prescribed by law." *Id.* § 924(e)(2)(A)(i), (ii).

In support of his § 2255 motion Bruten argued that his convictions for aggravated assault and fleeing and eluding no longer qualified as ACCA predicate offenses in light of *Johnson*'s holding, and that without those convictions he lacked sufficient qualifying convictions. In response, the government argued that Bruten's *Johnson* claim was subject to a procedural default because he did not raise it on direct appeal, and he could not show cause or prejudice to overcome the default. Bruten could not show cause, the government argued, because although circuit precedent foreclosed his claim at the time of his direct appeal, there was no impediment to his asserting the challenge he brought in his § 2255 motion. As to prejudice, the government conceded that Bruten's fleeing and eluding conviction no longer qualified as a "violent felony," but it argued that Bruten had at least three qualifying convictions notwithstanding *Johnson*. Binding circuit precedent established that his 2004 conviction for aggravated assault qualified as a violent

felony under ACCA's elements clause. *See Turner v. Warden*, 709 F.3d 1328, 1338 (11th Cir. 2013), *abrogated on other grounds by Johnson*, 135 S. Ct. 2551. And Bruten had four prior convictions for serious drug offenses, including the 1997 sale/delivery of cocaine, 2004 manufacture of cocaine, 2005 sale of cocaine within 1,000 feet of a school, and 2008 sale of cocaine within 1,000 feet of a public park.

The district court agreed with the government's assessment of prejudice[3] and denied Bruten's § 2255 motion. The district court found that Bruten "has five prior convictions for violent felonies or serious drug offenses that still qualify under the ACCA," including the four drug convictions and the aggravated assault conviction. Civ. Doc. 19 at 4-5. Bruten has appealed.

II. STANDARD OF REVIEW

When reviewing the district court's ruling on a § 2255 motion, we review findings of fact for clear error and questions of law *de novo*. *Rhode v. United States*, 583 F.3d 1289, 1290 (11th Cir. 2009). We may affirm on any ground supported by the record. *Castillo v. United States*, 816 F.3d 1300, 1303 (11th Cir. 2016) (internal quotation marks and citation omitted).

III. DISCUSSION

[3] The district court did not address whether Bruten had demonstrated cause to overcome the procedural default.

Bruten argues that the district court erred in concluding that his claim was procedurally defaulted. He argues that the district court was permitted to rely only on the convictions listed in his PSR as ACCA predicates to determine his eligibility for relief and that, now that one of the three listed ACCA predicates does not qualify as a violent felony, he must be resentenced.[4] He argues that the district court's reliance on other prior convictions runs afoul of *United States v. Canty*, in which this Court held that the government's "fail[ure] to voice any objection that the sentencing court had not made any findings as to which of [the defendant's] convictions were predicates for the ACCA enhancement" made "further findings . . . inappropriate." 570 F.3d 1251, 1257 (11th Cir. 2009).

After this case was fully briefed, but before we held oral argument, this Court rejected the theory Bruten advances. *See Tribue*, 929 F.3d at 1331-34. In *Tribue*, as here, the § 2255 movant's PSR designated him as an armed career criminal under ACCA and specifically listed three predicates, one of which was fleeing and eluding under Florida law. *Id.* at 1328. The PSR also included a criminal history section, which listed "several additional prior Florida convictions." *Id.* Tribue represented to the district court that he had no objections to the PSR and, as here, the district court did not state which of Tribue's prior

[4] Bruten also argues that he can demonstrate cause to overcome the procedural default. We need not address his argument, however, because under *Tribue* Bruten cannot establish prejudice.

convictions it relied upon when it imposed the ACCA enhancement. *See id.* at 1328-29. Tribue, like Bruten, did not file a direct appeal, but filed a § 2255 motion challenging his ACCA-enhanced sentence after the Supreme Court's decision in *Johnson*, arguing that his fleeing and eluding conviction no longer qualified as an ACCA predicate and therefore that he lacked the requisite three predicates. *See id.* at 1329-30. Tribue, citing *Canty*, 570 F.3d at 1256, "asserted that the government effectively waived reliance on the use of any other prior convictions listed in the PS[R]," because:

> (1) The PS[R] identified only three specific convictions as ACCA predicates, (2) at sentencing, the government did not object to the PS[R] or state its reliance on any of Tribue's other prior convictions as ACCA predicates, and (3) the sentencing court adopted the PS[R] without change.

Id. at 1330. The district court rejected Tribue's argument and relied on other prior convictions to sustain his ACCA-enhanced sentence.

This Court affirmed. We held that a § 2255 movant cannot satisfy his burden to demonstrate entitlement to relief under *Johnson* when he has three qualifying convictions notwithstanding *Johnson* and that the government can rely on (and present evidence about) those additional prior convictions to defeat a movant's claim. *Id.* at 1331-32. We held that *Canty*, in which the defendant had objected to his ACCA classification at sentencing, was materially distinguishable and therefore did not support Tribue's waiver argument. *Id.* at 1333-34; *see also*

id. at 1334 (distinguishing a case similar to *Canty*, *Bryant v. Warden*, 738 F.3d 1253 (11th Cir. 2013), *overruled on other grounds by McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir. 2017) (en banc)).

Tribue is factually and legally on point with this case and therefore dictates its outcome. Under *Tribue*, Bruten has not satisfied his burden to show entitlement to relief because, notwithstanding *Johnson*, he has three ACCA-qualifying convictions: aggravated assault[5] and four "serious drug offenses." Indeed, Bruten concedes that he has at least three qualifying offenses even after *Johnson*. Bruten's argument for relief hinges on his assertion that the government has waived reliance on his other convictions, but *Tribue* rejected this theory even though there, as here, the PSR listed three ACCA-qualifying offenses, the government did not object to the PSR or rely on any other convictions to support the enhancement, and the sentencing court adopted the PSR without change. *See id.* at 1332.

Bruten acknowledges *Tribue*'s holding but argues that his case is distinguishable. Specifically, he contends that unlike in *Tribue*, he and the government agreed in his plea agreement that he had "three felonies that . . .

[5] Although he acknowledges that his argument is foreclosed by precedent, Bruten challenges the district court's determination that his aggravated assault conviction remains a valid predicate. *See Turner*, 709 F.3d at 1338. Even in the absence of this precedent, we would affirm the district court based on Bruten's qualifying serious drug offenses.

qualify him as an Armed Career Criminal," Crim. Doc. 35 at 21, and that the government is bound to this limited number. Bruten's argument may have had merit if his plea agreement had stated that Bruten had "*only* three felonies" that qualified him as an armed career criminal, but the plea agreement was not so limited. So, Bruten's plea agreement does not put him on different footing than Tribue.

Bruten alternatively argues that *Tribue* was wrongly decided. But as a three-judge panel we are bound to follow *Tribue*. *United States v. Brown*, 342 F.3d 1245, 1246 (11th Cir. 2003).

For these reasons, the district court correctly denied Bruten's § 2255 motion. We therefore affirm.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10044-G

ANTHONY MARVIN BRUTEN,

Petitioner-Appellant

versus

UNITED STATES OF AMERICA,

Respondent-Appellee

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

ORDER:

Anthony Marvin Bruten, a federal prisoner, moves this Court for a certificate of appealability ("COA") to appeal the district court's dismissal of his 28 U.S.C. § 2255 motion to vacate sentence as procedurally barred. Bruten's motion for a COA is GRANTED on the following issue only:

> Whether the district court erred in dismissing Bruten's 28 U.S.C. § 2255 motion as procedurally barred based on its conclusion that the government was permitted to rely on prior convictions in the presentence investigation report ("PSI"), as predicate offenses under the Armed Career Criminal Act, despite the fact that neither the PSI nor the sentencing court explicitly found those other convictions to be proper predicate offenses.

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ANTHONY MARVIN BRUTEN,

Petitioner,

v.

Case No: 6:16-cv-1132-Orl-18DCI
(6:12-cr-312-Orl-18DCI)

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

This cause is before the Court on the Motion to Vacate, Set Aside, or Correct Sentence ("Motion to Vacate," Doc. 1) filed by Petitioner pursuant to 28 U.S.C. § 2255. Petitioner also filed a Memorandum of Law (Doc. 10) in support of the Motion to Vacate. The Government filed a Response (Doc. 15) in opposition to the Motion to Vacate. Petitioner filed a Reply (Doc. 18) to the Response. For the reasons set forth herein, the Motion to Vacate is denied.

I. PROCEDURAL BACKGROUND

A Grand Jury charged Petitioner by Indictment with one count of possession of a firearm by a convicted felon (Count One). (Criminal Case No. 6:12-cr-312-Orl-18DCI, Doc. 11).[1] Petitioner subsequently entered into a Plea Agreement (Criminal Case Doc. 35) in which he agreed to enter a guilty plea to Count One of the Indictment. Petitioner

[1] Criminal Case No. 6:12-cr-312-Orl-18DCI will be referred to as "Criminal Case).

entered his plea before Magistrate Judge David A. Baker, who filed a Report and Recommendation Concerning Plea of Guilty. (Criminal Case Doc. 40) recommending that the Plea Agreement and the guilty plea be accepted and that Petitioner be adjudged guilty and have sentence imposed accordingly.

The Court entered an Acceptance of Plea of Guilty and Adjudication of Guilt (Criminal Case Doc. 43) in which the guilty plea was accepted and Petitioner was adjudicated guilty of the offense. The Court then entered a Judgment in a Criminal Case (Criminal Case Doc. 49) in which Petitioner was sentenced to imprisonment for a term of 180 months, to be followed by supervised release for a term of 5 years. Petitioner did not file a direct appeal.

II. ANALYSIS

Petitioner argues that, pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015), his sentence is unconstitutional because he "no longer has three Armed Career Criminal Act [`ACCA'] qualifying predicate offenses." (Doc. 1 at 4). He states that his prior Florida convictions for aggravated assault and fleeing and eluding no longer qualify as violent felonies under the ACCA. (Doc. 10 at 4-7).

Petitioner did not file a direct appeal, and, therefore, his claims were not raised with the appellate court. "As a general rule, a criminal defendant who fails to object at trial or to raise an issue on direct appeal is procedurally barred from raising the claim in a section 2255 motion absent a showing of cause for failing to preserve the claim and actual prejudice from the alleged error." *Orso v. United States*, 452 F. App'x 912, 914

(11th Cir. 2012). In the alternative, "the merits of a procedurally defaulted claim may be reached, in very narrowly defined circumstances, if failure to address the claim would result in a 'fundamental miscarriage of justice.'" *Id.* Actual innocence of the offense may be shown to satisfy the fundamental miscarriage of justice standard. *Id.*

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

The Court rejects Petitioner's argument. Under the ACCA, three or more prior convictions "for a violent felony or a serious drug offense, or both, committed on occasions different from one another," may warrant a sentence enhancement. 18 U.S.C. § 924(e)(1). A "violent felony" is a crime punishable for over one year of imprisonment that: "(i) has an element, the use, attempted use, or threatened use of physical force . . . [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) (emphasis added). The italicized portion of the definition pertaining to a violent felony is referred to as the ACCA's "residual clause." In *Johnson*, the Supreme Court decided that the residual clause did not survive constitutional analysis, thereby barring certain offenses which would fall under the clause from contributing to an ACCA sentence enhancement.

In *Johnson*, the Supreme Court "did not call into question the application of the elements clause and the enumerated clause of the ACCA's definition of a violent felony." *In re Hires*, 825 F.3d 1297, 1299 (11th Cir. 2016). Moreover, the "decision in *Johnson* did not alter the definition of a serious drug offense, but only the residual clause pertaining to certain violent felonies as predicate offenses." *United States v. Brandon*, No. 09-10377-NMG, 2016 WL 4426141, at *3 (D. Mass. Aug. 16, 2016).[2]

In the present case, as discussed below, Petitioner has five prior convictions for violent felonies or serious drug offenses that still qualify under the ACCA. As a result, Petitioner still has at least three ACCA-qualifying convictions.

In 1997, Petitioner was convicted in the State of Florida of unlawful sale/delivery of a controlled substance. (Presentence Investigation Report ("PSR") at 6). In 2003, Petitioner was convicted in the State of Florida of aggravated assault. (*Id.* at 10).[3] In 2004, Petitioner was convicted in the State of Florida of (1) manufacture of cocaine, and (2) selling and possession of cocaine within 1,000 feet of a school. (*Id.* at 12). In 2008,

---

[2] Under the ACCA, a "serious drug offense" includes "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." 18 U.S.C. § 924(e)(2)(A)(ii).

[3] The Eleventh Circuit Court of Appeals has held that "a Florida conviction for aggravated assault under § 784.021 is categorically a violent felony under the ACCA's elements clause." *In re Hires*, 825 F.3d 1297, 1301 (11th Cir. 2016).

Petitioner was convicted in the State of Florida of sale of cocaine within 1,000 feet of a school. (*Id.* at 13).

Petitioner argues that, pursuant to *United States v. Canty*, 570 F.3d 1251 (11th Cir. 2009), the Government should be precluded from relying on these convictions because the Probation Office did not expressly identify them as ACCA-qualifying convictions in the PSR. (Doc. 18 at 10). However, unlike the situation in *Candy*, in the instant case, the prior convictions needed to qualify Petitioner under the ACCA were included in the PSI, and there is no need to reopen the sentencing proceeding to supplement the record.

In addition, the Eleventh Circuit has held that § 924(e) does not even require the Government to affirmatively seek an enhancement because the enhancement is mandatory if Petitioner has the underlying predicate prior convictions. *United States v. Gibson*, 64 F.3d 617, 625 (11th Cir.1995). Here, Petitioner was notified of the prior convictions in the PSI, which was filed before Petitioner's sentencing hearing. The specific identification of certain qualifying convictions in the Probation Officer's response to the PSI did not amount to a waiver of reliance on other convictions that were also listed in the PSI.

As such, Petitioner has at least three ACCA-qualifying convictions, and the *Johnson* decision does not provide a basis to overcome the procedural bar. Petitioner does not demonstrate that his procedurally barred claims should be considered under the actual innocence and fundamental miscarriage of justice standard. Further, the entire record has been reviewed, and the Court concludes that Petitioner is unable to

satisfy the exceptions to the procedural bar. Accordingly, Petitioner's claims are procedurally barred, and the Motion to Vacate is denied.[4]

III. CERTIFICATE OF APPEALABILITY

This Court should grant an application for a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Lamarca v. Sec'y, Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). However, the petitioner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

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

IV. CONCLUSION

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

1. The Motion to Vacate, Set Aside, or Correct Sentence (Doc. 1) is **DENIED**.
2. This case is **DISMISSED with prejudice**.
3. Petitioner is **DENIED** a certificate of appealability.

---

[4] Further, as discussed, Petitioner's claims are without merit.

4. The Clerk of the Court is directed to enter judgment in favor of Respondent and to close this case. A copy of this Order and the judgment shall also be filed in criminal case number 6:12-cr-312-Orl-18DCI.

5. The Clerk of the Court is directed to terminate the section 2255 motion (Criminal Case Doc. 63) filed in criminal case number 6:12-cr-312-Orl-18DCI.

DONE and **ORDERED** in Orlando, Florida on November 2, 2017.

G. KENDALL SHARP
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party
OrlP-2 11/1