APPENDIX A

958 F.3d 1148
United States Court of Appeals, Eleventh Circuit.

Alex Cori TRIBUE, Petitioner-Appellant,
v.
UNITED STATES of America, Respondent-Appellee.

No. 18-10579
|
Date Filed: 05/14/2020

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Appeal from the United States District Court for the Middle District of Florida D.C. Docket No. 6:16-cv-00976-GKS-DCI

Before ED CARNES, Chief Judge, WILSON, WILLIAM PRYOR, MARTIN, JORDAN, ROSENBAUM, JILL PRYOR, NEWSOM, BRANCH, GRANT, LUCK, and LAGOA, Circuit Judges.

Opinion

BY THE COURT:

***1149** 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.

MARTIN, Circuit Judge, joined by JILL PRYOR, Circuit Judge, dissenting from the denial of rehearing en banc:

Alex Tribue seeks review of his 170-month sentence. In 2013, he pled guilty to one count of conspiracy to distribute and possess with intent to distribute cocaine as well as one count of being a felon in possession of a firearm. Before he was sentenced for these crimes, the Probation Department prepared a presentence investigation report ("PSR") that said Mr. Tribue's sentence is governed by the statute known as the Armed Career Criminal Act ("ACCA"). At the time of Mr. Tribue's sentence, and now, ACCA requires a sentence of at least 15 years for any person convicted of possessing a firearm, who, prior to committing this crime, already had three convictions for either a "violent felony or a serious drug offense." 18 U.S.C. § 924(e)(1).

When Mr. Tribue was sentenced, his PSR listed three—and only three—prior convictions as justifying an ACCA sentence for him. Those were 2003 and 2009 convictions for delivery of cocaine as well as a 2006 conviction for "fleeing and eluding" under Florida law. The PSR showed other criminal convictions for Mr. Tribue, but the Probation Department did not refer to or rely on any of them in recommending that Tribue be sentenced in accord with the 15-year minimum required by ACCA. The District Court adopted the PSR in full and sentenced Mr. Tribue to 170 months in prison. [1]

At the time Mr. Tribue was sentenced, ACCA defined a "violent felony" as any crime punishable by more than one year in prison 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 definition of a "violent felony" in subclause (i) is known as the "elements clause." The beginning of ***1150** subclause (ii) (i.e., everything preceding "or otherwise") is referred to as the "enumerated clause." The rest of subclause (ii) is referred to as the "residual clause."

Two years after Mr. Tribue was sentenced, the Supreme Court decided Johnson v. United States, 576 U.S. ——, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2015). This decision struck down the residual clause of ACCA as unconstitutionally vague. Id. at 2563. After Johnson was decided, the Supreme Court told us that people (like Mr. Tribue) who were sentenced under ACCA before the Johnson decision are entitled to the retroactive benefit of its ruling. See Welch v. United States, 578 U.S. ——, 136 S. Ct. 1257, 1268, 194 L.Ed.2d 387 (2016). In other words, a defendant who "would not have been sentenced as an armed career criminal absent the existence of the residual clause" is entitled to resentencing

without an ACCA enhancement. Beeman v. United States, 871 F.3d 1215, 1221 (11th Cir. 2017).

When Mr. Tribue learned that Johnson's interpretation of ACCA was intended to benefit people retroactively, he asked the District Court to resentence him pursuant to 28 U.S.C. § 2255. He noted that his PSR identified only the three prior convictions (those from 2003, 2006 and 2009 mentioned above) as the predicates for his longer ACCA sentence. He argued, in turn, that because his fleeing and eluding conviction could only have qualified as a violent felony under the residual clause of ACCA he is no longer subject to its 15-year mandatory minimum sentence. He asked to be resentenced on this basis. The government opposed Mr. Tribue's motion, urging the District Court now to rely upon another conviction—a 2007 conviction for delivery of cocaine—to qualify as his third conviction to meet ACCA requirements. The government made this argument despite the fact that the 2007 conviction was not relied upon in the PSR as a basis for imposing an ACCA sentence, nor apparently by the sentencing judge when he imposed that sentence on Mr. Tribue in 2013. Nevertheless, the District Court agreed with the government and denied Johnson relief to Mr. Tribue. Mr. Tribue was granted a certificate of appealability, but a unanimous panel of this Court affirmed the District Court's decision. See Tribue v. United States, 929 F.3d 1326, 1334 (11th Cir. 2019).

I believe the panel's ruling in Mr. Tribue's appeal is mistaken. When a defendant is sentenced under ACCA based on specified prior convictions, and then we learn, on collateral review, that fewer than three of the relied-upon convictions are still valid, this defendant is entitled to relief. The panel decision denying relief to Mr. Tribue erred in three respects. In my view, any one of these errors is reason enough to rehear this case en banc. First, the panel opinion incorrectly relieves the government of the burden of proving that Mr. Tribue is eligible for a longer sentence under ACCA and places the burden on him to prove he's not. Second, the panel opinion's analysis is based on an unreasonably narrow view of Eleventh Circuit precedent. Finally, the panel opinion creates a split with the Fourth and Seventh Circuits, which confronted the same question presented by Mr. Tribue's case and came out differently. These mistakes deprive Mr. Tribue of any ability to get the relief the Supreme Court made available to him (and people like him) in Johnson. And it does so by placing procedural barriers nowhere suggested by the Supreme Court when it invalidated ACCA's residual clause. This is why I asked our Court to rehear Mr. Tribue's case en banc. I dissent from its decision to leave Mr. Tribue to serve his flawed sentence.

*1151 I. THE PANEL OPINION REMOVES THE GOVERNMENT'S BURDEN OF PROVING ELIGIBILITY FOR ACCA.

This Court has long recognized that the government "bears the burden of proving that a sentencing enhancement under the ACCA is warranted." United States v. Lee, 586 F.3d 859, 866 (11th Cir. 2009). The panel opinion departs from this rule by allowing district courts to rely on prior convictions, not considered by the court at the original sentencing, to keep in place the harsher ACCA sentence when a defendant seeks habeas corpus relief. The burden of the government to show that a person is legally eligible for a harsher sentence under ACCA is fundamental to the integrity of federal sentencing. This is particularly true of people serving ACCA sentences that have been called into question by rulings of the Supreme Court. The government was never required to prove that Mr. Tribue's 2007 cocaine conviction meets the statutory requirements to justify his sentence under ACCA. Yet now that Mr. Tribue seeks relief from his sentence by way of his § 2255 motion, the panel requires him to prove this 2007 conviction is not a proper basis for ACCA to apply. See Beeman, 871 F.3d at 1221–22.

The panel opinion shifting the burden to Mr. Tribue is fundamentally unfair to him and others like him. The Fourth Circuit has recognized as much. That court has ruled that permitting the government to introduce new justifications for an ACCA sentence upon collateral review "unfairly deprive[s] petitioner[s] of an adequate opportunity to respond." United States v. Hodge, 902 F.3d 420, 429 (4th Cir. 2018) (second alteration in original) (quoting Giordenello v. United States, 357 U.S. 480, 488, 78 S. Ct. 1245, 1251, 2 L.Ed.2d 1503 (1958)). This is so not only because of the improper switch of the burden of proof, but also because the habeas process is a more demanding arena for inmates seeking relief. A defendant who believes a prior conviction was unlawfully designated as an ACCA predicate at sentencing has the right to challenge that decision before the district court and appeal it to our Court. When a challenge is raised in a habeas petition—as it must for prisoners

bringing claims under Johnson and related decisions —"the opportunities for review ... are far more limited," given the need to secure a certificate of appealability. Id. at 430 (citing 28 U.SC. § 2253(c)(1)). If the government wanted to use Mr. Tribue's 2007 cocaine conviction to support his ACCA sentence, it should have carried its burden of proving that conviction met the legal requirements at the time he was sentenced. Mr. Tribue should have had the opportunity to challenge the propriety of using the 2007 conviction at the time the sentencing court was calculating his sentence. His due process rights are violated by having the government now spring this new justification for his ACCA sentence upon him in the context of collateral review of his sentence. See id. at 427, 430; see also Dotson v. United States, 949 F.3d 317, 321 (7th Cir. 2020) ("Fair notice underpins due process precisely because it prevents surprise and affords opportunities to respond.").

The panel justifies this impermissible switch in burdens in three ways. None relieve my concerns. First, the panel points out that Mr. Tribue did not dispute the factual existence of his 2007 cocaine conviction at any time during his sentencing proceedings. Tribue, 929 F.3d at 1332. That may be so, but the panel conflates the factual existence of Mr. Tribue's 2007 cocaine conviction with the question of whether it qualifies as a serious drug offense under ACCA. See McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1120–21 (11th Cir. 2017) (Martin, J., ***1152** dissenting). These are distinct questions with different burdens. Id. There is simply no justice in faulting Mr. Tribue because he did not raise a fruitless objection to the factual existence of his 2007 cocaine conviction, when this conviction was never raised at his sentencing hearing.

Second, the panel says Mr. Tribue's failure to object to the fleeing and eluding predicate "alone suffices" as a reason to deny him habeas relief. See Tribue, 929 F.3d at 1332. This ignores the development of the law, and the Supreme Court's direct instruction that inmates should be given retroactive relief under Johnson. At the time Mr. Tribue was sentenced, the state of the law was clear that his 2006 conviction for fleeing and eluding was a valid ACCA predicate. See United States v. Petite, 703 F.3d 1290, 1296, 1300–01 (11th Cir. 2013) (holding that Florida fleeing and eluding qualifies as a violent felony under ACCA's residual clause), abrogated by Johnson, —— U.S. ——, 135 S. Ct. 2551, 192 L.Ed.2d 569. Ordinarily, we expect litigants to seek relief from the courts only when they have a good-faith basis for asking the court for it. The panel's rule now imposes an after-the-fact duty upon federal defendants to make objections on any topic that could someday be the subject of constitutional challenges. In this way, the panel opinion invites the overtaxing of our federal courts, the defense bar, and federal prosecutors.

Finally, the panel says its rule is not, in fact, unfair: "If Tribue had no way to anticipate Johnson's invalidation of the residual clause in the ACCA, and therefore did not object, then the government equally did not either." Tribue, 929 F.3d at 1332. This statement equates the power of the prosecutor and the prosecuted. Mr. Tribue's 2007 conviction was available to support his ACCA sentence only if the government met its burden of showing that it was a proper predicate. See Lee, 586 F.3d at 866. Since the government never mentioned the 2007 conviction, Mr. Tribue had no reason to think the government was relying on it. Thus, the panel's suggestion that its rule disadvantages both parties equally is simply not so. The government gets to keep the longer sentence it always wanted for Mr. Tribue, while he is deprived of a fresh look at the acknowledged constitutional problems with the sentence that was imposed on him in 2013.

II. THE PANEL OPINION STRAYS FROM OUR CIRCUIT PRECEDENT.

The panel's decision to deny Mr. Tribue relief also deviates from two lines of Eleventh Circuit precedent. The first is a group of cases that holds the government to its submissions at sentencing when examining an ACCA sentence retroactively. The second is Beeman, which sets forth a two-step inquiry governing all § 2255 petitions for Johnson relief.

A. THE PANEL OPINION MISREADS CANTY, PETITE, AND BRYANT.

Our circuit has three published cases holding that the government may not change its position about which predicate convictions support an ACCA enhancement after the sentence has been imposed. See Bryant v. Warden, FCC Coleman-Medium, 738 F.3d 1253, 1279 (11th Cir.

2013), overruled on other grounds by McCarthan, 851 F.3d 1076 (en banc); Petite, 703 F.3d at 1292 n.2; United States v. Canty, 570 F.3d 1251, 1256–57 (11th Cir. 2009). Nevertheless, the panel opinion deprives Mr. Tribue of the benefits of this precedent by interpreting them so narrowly that they render him no assistance.

Our circuit's caselaw requires both the government and the defendant to object to ***1153** the sentencing court's findings of fact and conclusions of law at the initial sentence hearing. Canty, 570 F.3d at 1256–57. When a district court imposes a longer sentence based on specified prior convictions and the government does not object, the government waives its right to later justify that sentence by substituting in another conviction later in the proceedings. Bryant, 738 F.3d at 1279; Petite, 703 F.3d at 1292 n.2.

The panel says a number of factors distinguish these cases from Mr. Tribue's. First, the panel rejects the relevance of Bryant and Canty by saying that "the defendants [in those cases] expressly objected to their ACCA classification at the original sentencing." Tribue, 929 F.3d at 1333. But again, this assertion creates a false equivalency. The question here is not whether Mr. Tribue waived an argument he should have raised earlier, but rather whether the government should have objected to the District Court's finding that Tribue's ACCA sentence was based on the three prior convictions identified in the PSR. Beyond that, the Bryant panel's waiver ruling had nothing to do with whether Mr. Bryant objected to a particular predicate conviction. Rather, Bryant said "the government waived this ... issue" when it "never objected to" the district court's finding at sentencing "that Bryant had at most three qualifying predicate convictions." Bryant, 738 F.3d at 1279. The government's failure to object to the district court's reasons for imposing the ACCA sentence was all that mattered to the Bryant panel's decision to deny the government's effort to rely upon a new predicate offense on appeal. See id.

And then there is Petite. It said "[t]he government cannot offer for the first time on appeal a new predicate conviction in support of an enhanced ACCA sentence." 703 F.3d at 1292 n.2. Although this statement would seem to be directly on point with the question in Mr. Tribue's case, the panel discounts it as "pure dicta." Tribue, 929 F.3d at 1334 n.10. It was not dicta. Even though the Court affirmed Mr. Petite's sentence, it still rejected the government's argument that it could avoid the question at the heart of his case by substituting in a conviction that had not been previously relied upon for his ACCA sentence. See Petite, 703 F.3d at 1292 n.2. As with Bryant and Canty, the panel notes that Mr. Petite "had objected [to his ACCA enhancement] at sentencing and on direct appeal." Tribue, 929 F.3d at 1334 n.10. But again here, this argument puts a burden upon Mr. Tribue to have objected to proof not offered by the government. Petite does not require this.

Third, the panel notes that in Canty the government explicitly disclaimed reliance on additional facts in the PSR, while in Mr. Tribue's case the government did not do so. Id. at 1333. But as I've said, this fact is not relevant to the legal question presented in Mr. Tribue's case. And more to the point, this fact was also not relevant to the Canty panel's holding that the government "is entitled to [only one] opportunity to offer evidence and seek rulings from the sentencing court in support of an enhanced sentence." Canty, 570 F.3d at 1257. The government's disclaimer of certain facts was relevant only to the remedy offered to Mr. Canty. See id. at 1256–57. Because the government disclaimed the facts, once Mr. Canty's sentence was vacated, his case was returned to the district court with instructions not to rely on those facts in resentencing him. Id. at 1257. This did nothing to dilute Canty's broader holding that the government must assert all grounds for an ACCA sentence at the original sentencing. See id. at 1256–57.

Finally, the panel says, even if Canty, Petite, and Bryant say what Mr. Tribue ***1154** and I read them to say, it doesn't matter because there is a more directly on-point case that allows us to reject Tribue's § 2255 petition. The panel points to United States v. Martinez, 606 F.3d 1303 (11th Cir. 2010), which the panel says limited Canty to its facts and established that the government can introduce evidence of new and different predicates on collateral review. Tribue,

929 F.3d at 1333 n.9. However, Martinez was a direct appeal case that had nothing to do with a type of retroactive relief the Supreme Court has instructed us to make available to defendants serving faulty ACCA sentences. See 606 F.3d at 1304. Also, in Martinez, the record did not establish that the government waived reliance on the evidence allowed to be introduced on remand. See id. at 1304–05. But perhaps most importantly for our purposes, Martinez acknowledged that in Canty the government was properly denied a "second bite at the apple" because it had waived reliance on the evidence it subsequently sought to introduce. Id. at 1304–05 (quotation marks omitted); see also United States v. Washington, 714 F.3d 1358, 1362 (11th Cir. 2013) (denying the government the ability to present additional evidence on remand when it was aware of the defendant's objection during sentencing). In the same way that certain factors motivated this Court to allow introduction of additional evidence in the resentencing of Mr. Martinez, there are "powerful reasons" to hold the government to its waiver at sentencing in this context. See Martinez, 606 F.3d at 1306.

Our circuit precedent prevents the government from offering a prior conviction as an ACCA predicate after it failed to do so at the time of the sentence was imposed. The panel's attempts to distinguish this precedent on their facts—facts that do not relate to our consideration of Mr. Tribue's legal claim—should not prevent us from remaining clear-eyed in our application of binding circuit law. [2]

B. THE PANEL OPINION MISAPPLIES BEEMAN.

Under Beeman, a Johnson petitioner must make two showings before he can receive collateral relief. First, he must show that his original ACCA sentence was imposed based solely on the residual clause. Beeman, 871 F.3d at 1221. Second, he must show he did not have at least three other prior convictions that could have qualified as a serious drug offense, or as a violent felony under either the enumerated clause or elements clause. Id. In Mr. Tribue's case, the panel never asks the step one question and heads straight to step two. Tribue, 929 F.3d at 1331. I acknowledge that Beeman uses the word "and" between steps one and two, indicating a defendant must pass both. I also acknowledge that I have expressed my disagreement with Beeman's test. See Beeman v. United States, 899 F.3d 1218, 1226–29 (11th Cir. 2018) (Martin, J., dissenting from the denial of rehearing en banc); see also Beeman, 871 F.3d at 1228–30 (Williams, J., dissenting). But this is not about that. My difference with the panel is this: I say that in order to read Beeman as a cohesive statement of the law, the "prior convictions" considered at step two must be limited to those that were considered by the sentencing court at the time it imposed the sentence. In contrast, the Tribue panel opinion interprets Beeman to allow any conviction that was listed in the PSR to be resurrected on habeas review so ***1155** as to keep the harsher ACCA sentence in place. In practical application, the panel opinion's reading of Beeman reaps absurd results and strays from this Court's previous interpretation of Johnson. In doing so, it denies Mr. Tribue and others like him the habeas relief they deserve.

Under the panel opinion's interpretation of Beeman, the district court may in all cases skip the question of whether the defendant was sentenced under the residual clause. No matter the record at sentencing, a court reviewing a sentence in the collateral context may ask only whether the defendant had other prior offenses that could have supported that same sentence. The first problem with this approach is that it treats similarly defendants who are, for relevant purposes, not alike. For example, Mr. Tribue's is the rare case in which a defendant can show that his ACCA sentence could only have been imposed by relying on the residual clause. See Br. of Appellee at 11. It is clear then, to me, that he is deserving of relief because he was "sentenced solely per the residual clause." See Beeman, 871 F.3d at 1224 n.5. But the panel opinion ignores this reality by asking whether any other facts exist that could have supported his sentence. In other words, the panel opinion treats Mr. Tribue identically to a defendant whose ACCA sentence was imposed without regard to any particular prior offenses. [3] This outcome does not strike me as logical or fair.

In addition, we know the panel opinion's decision to skip straight to step two strays from Beeman's heavy focus on the habeas court's search for the "historical fact." See 871 F.3d at 1224 n.5. Specifically, the Beeman Court said habeas courts must ask whether the defendant was "sentenced solely per the residual clause." Id. Again, the

panel opinion ignores this crucial question. Beeman also refers to a § 2255 movant losing on his petition because of a "silent record." Id. at 1224–25 & nn.4, 5. I have always understood this to mean, on the one hand, that if a § 2255 petitioner is penalized for a silent record, then, on the other hand, someone like Mr. Tribue (who can show how his sentence was a product of the residual clause) would fare better. Not so under the ruling of the Tribue panel.

The panel opinion's approach to Beeman means step one can only be used when it disqualifies someone like Mr. Tribue from getting relief but not when it qualifies him for relief. This approach is not in keeping with Beeman, which requires that we look to what happened at sentencing. Our review was meant to be limited to what the sentencing court considered at the time it imposed sentence.

III. THE PANEL OPINION CREATES A CIRCUIT SPLIT.

Finally, the panel opinion creates a split between our Court and the Fourth Circuit, which confronted the same question as Mr. Tribue's panel, but came out the opposite way. See Hodge, 902 F.3d at 427–31. The Tribue panel opinion is also out of step with the Seventh Circuit, which adopted a rule for deciding when petitioners like Mr. Tribue are entitled to relief. See Dotson, 949 F.3d at 321. Our Court's departure from the thoughtful rulings of these circuits counsels in favor of rehearing Mr. Tribue's case.

A. THE FOURTH CIRCUIT'S RULING IN HODGE

In Hodge, the Fourth Circuit confronted facts that are, for our purposes, identical ***1156** to those of Mr. Tribue's case. [4] See 902 F.3d at 423–25. Garnett Hodge was convicted of possession with intent to distribute crack cocaine and being a felon in possession. Id. at 423. He received an ACCA sentence based on three prior convictions the PSR identified as predicates for the longer sentence. Id. at 423–24. The PSR mentioned other prior convictions but did not designate them as ACCA predicates. Id. at 424. Neither the sentencing court nor the government discussed which of Mr. Hodge's prior convictions it was relying upon to impose his ACCA sentence. Id. The district court generally adopted the PSR without change. Id. Mr. Hodge appealed his sentence, but his appeal was dismissed based on an appeal waiver in his plea agreement. Id. He also filed an unsuccessful § 2255 petition in 2014. Id. Then in 2016, Mr. Hodge received permission to file a second § 2255 petition in light of Johnson. Id. at 424–25.

In his habeas petition, Mr. Hodge argued that his ACCA sentence was no longer valid because one of the three convictions used to support his sentence was for reckless endangerment. Id. at 425. The government argued that Mr. Hodge still qualified for the enhancement based on another prior felony drug conviction. Id. But this conviction had not been one of the three identified in the PSR as supporting Mr. Hodge's ACCA sentence. Id. at 424–25. The district court denied the § 2255 petition. Id. at 425.

The Fourth Circuit reversed the decision denying Mr. Hodge's petition. It ruled that the government had one chance —sentencing—to prove Mr. Hodge had enough ACCA-qualifying predicate convictions to be sentenced under that statute. Id. at 427–28. The court reasoned that Mr. Hodge's failure to object to additional prior convictions could not be held against him because he was not on notice that those convictions could ever be used as ACCA predicates. Id. at 428. To force the defendant to object in this circumstance "would undermine the adversarial process: It would place defense counsel in the precarious position of flagging potential predicates that neither the U.S. Probation Office nor the Government had contemplated, likely to the defendant's detriment." Id. The court was not moved by the government's argument that the PSR failed to designate the additional conviction as an ACCA predicate because doing so would have been "unnecessary." Id. at 428 n.4. Much as the defendant's failure to object to the PSR constitutes a waiver of those objections on collateral review, so too must that rule be applied to the government. Id. at 428–29. Also, permitting the government to substitute convictions on collateral review "would unfairly deprive petitioners of an adequate opportunity to respond." Id. at

429 (alteration adopted and quotation marks omitted). This is so because of the different burdens at sentencing and on collateral review, as well as the "far more limited" nature of collateral review, given the need for petitioners to secure a certificate of appealability. Id. at 429–30. Finally, I share the Fourth Circuit's view regarding our (pre-Tribue) circuit case law, when it said that "the Eleventh Circuit has reached the same conclusion." Id. at 430–31 (discussing Bryant and Petite).

***1157** B. THE SEVENTH CIRCUIT'S RULING IN DOTSON

The Seventh Circuit recently confronted its own version of Mr. Tribue's case. Steven Dotson received an ACCA sentence based on a discrete list of three predicates, one of which may no longer qualify as an ACCA predicate. Dotson, 949 F.3d at 319. The Seventh Circuit denied Mr. Dotson's petition for habeas corpus but did so in a way that highlights the mistaken approach our circuit has taken.

The question in Dotson was whether "fundamental unfairness arising from a lack of notice" resulted from the substitution of a new conviction as an ACCA predicate that had not been mentioned at the time of sentencing. Id. at 320. The Seventh Circuit held that no unfairness resulted for Mr. Dotson because his own legal filings "reflect[ed] the belief, albeit a mistaken one," that the additional predicate counted "as a qualifying ACCA predicate at the original sentencing." Id. at 321. Because Mr. Dotson could not credibly claim "undue surprise from allowing the substitution of a particular felony conviction not relied upon at sentencing," the court rejected his petition. Id.

The Seventh Circuit expressly disagreed with the "broader strokes" the Tribue panel used "in deciding the same question." Id. Our sister circuit recognized that this Court's holding in Tribue does not take account of the unfairness resulting from lack of notice to the defendant. Id. The Dotson court also agreed with the Fourth Circuit's concerns regarding "the unfairness of the defendant having no notice—no reason at sentencing—to believe the court or government may react to a change in the law favorable to the defendant by relying on another of his prior convictions to preserve the ACCA sentence." Id. Holding the government to its representations at sentencing—or, at least, what the defendant believed those to be—is a matter of due process. See id.

Both the Fourth and Seventh Circuits thus reject the approach our Court took in Mr. Tribue's case—where the first time any party mentioned the possibility of relying on a new and different conviction to justify Tribue's ACCA sentence was after he filed his § 2255 petition.

IV. CONCLUSION

I hoped our Court would rehear this case en banc. It presents a worthy topic with an immediate impact on the liberty of so many people sentenced in this circuit. It doesn't seem too much to ask that inmates who receive prolonged ACCA sentences hear specifically from the government its legal basis for seeking the extended prison sentence. The government should affirmatively identify the particulars of a defendant's criminal history that cause it to seek an ACCA sentence. If such a rule were enforced here, Mr. Tribue's ACCA sentence would be vacated, and he would be resentenced facing a statutory maximum of ten years for his gun charge.

The Tribue panel opinion leaves in place Mr. Tribue's sentence, which was imposed, in part, based on an unconstitutional statutory definition of what is a violent felony. I respectfully dissent from the Court's decision not to rehear his case.

All Citations

958 F.3d 1148 (Mem), 28 Fla. L. Weekly Fed. C 1143

Footnotes

1 Mr. Tribue was sentenced under the ACCA statute, but he was able to get a sentence 10 months below the statute's mandatory minimum sentence of 180 months. This is because the government filed a motion pursuant to 18 U.S.C. § 3553(e) that relieved the sentencing judge of the obligation to impose a 15-year sentence. This appeal still has consequences for Mr. Tribue, however, because if he had not been sentenced under ACCA, the maximum sentence the law would have allowed for his firearm offense would have been ten years. See 18 U.S.C. § 924(a)(2).

2 I note that the Fourth Circuit has also read the line of cases I've discussed here to prevent the government from justifying an old ACCA sentence in new ways. See Hodge, 902 F.3d at 430–31 (discussing Bryant and Petite); see also id. at 429 (citing Canty, 570 F.3d at 1256).

3 Worse, the panel opinion's approach would deny relief even to a defendant who was told by the sentencing court, "I am sentencing you based solely on the residual clause."

4 I recognize that the Fourth Circuit has a different standard than the Eleventh Circuit for § 2255 movants seeking Johnson relief. See United States v. Winston, 850 F.3d 677, 682 (4th Cir. 2017) (stating that a Johnson movant succeeds by showing that his sentence "may have been" predicated on application of the residual clause). But this standard was immaterial to the holding in Hodge.

APPENDIX B

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Dotson v. United States, 7th Cir.(Ind.), February 3, 2020

929 F.3d 1326
United States Court of Appeals, Eleventh Circuit.

Alex Cori TRIBUE, Petitioner-Appellant,
v.
UNITED STATES of America, Respondent-Appellee.

No. 18-10579
|
(July 11, 2019)

Synopsis

Background: Federal prisoner filed motion to vacate, set aside, or correct sentence. The United States District Court for the Middle District of Florida, No. 6:16-cv-00976-GKS-DCI; 6:13-cr-00005-GKS-GJK-1, G. Kendall Sharp, Senior Judge, denied motion, and prisoner appealed.

Holdings: The Court of Appeals, Hull, Circuit Judge, held that:

[1] defendant's Florida conviction for delivering cocaine qualified as predicate "serious drug offense" under Armed Career Criminal Act (ACCA), and

[2] government did not waive reliance on use of convictions outside of those identified as ACCA predicates in presentence investigation report.

Affirmed.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (4)

[1] **Criminal Law** Theory and Grounds of Decision in Lower Court
Criminal Law Review De Novo
Criminal Law Post-conviction relief

In reviewing denial of motion to vacate, Court of Appeals reviews district court's legal conclusions de novo and its findings of fact for clear error, and may affirm on any ground supported by record. 28 U.S.C.A. § 2255.

[2] **Criminal Law** Sentence and punishment

In order to obtain post-conviction relief from enhanced sentence imposed pursuant to Armed Career Criminal Act (ACCA) based on Supreme Court's decision in *Johnson v. United States* invalidating ACCA's residual clause, defendant must show that: (1) sentencing court relied solely on residual clause, as opposed to also or solely relying on either enumerated offenses clause or elements clause, and (2) there were not at least three other prior convictions that could have qualified under either of those two clauses as violent felony or serious drug offense. 18 U.S.C.A. § 924(e)(1).

6 Cases that cite this headnote

[3] **Sentencing and Punishment** Miscellaneous particular offenses

Defendant's Florida conviction for delivering cocaine qualified as predicate "serious drug offense" under Armed Career Criminal Act (ACCA). 18 U.S.C.A. § 924(e)(2)(A)(ii); Fla. Stat. Ann. § 893.13(1)(a).

3 Cases that cite this headnote

[4] **Sentencing and Punishment** Use and effect of report
Sentencing and Punishment Effect of change in law

Government did not waive reliance on use of convictions outside of those identified as Armed Career Criminal Act (ACCA) predicates in presentence investigation report (PSI), and thus defendant was not entitled to relief from ACCA enhancement after one of three listed convictions no longer qualified as predicate

offense following *Johnson v. United States*, even though government did not object to PSI on ground that defendant had more qualifying convictions than those identified by probation officer as supporting ACCA enhancement, where, at his original sentencing, defendant admitted that he had all convictions listed in PSI and raised no objection to his ACCA enhancement, and PSI identified another predicate conviction. 18 U.S.C.A. § 924(e).

5 Cases that cite this headnote

Attorneys and Law Firms

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Roberta Josephina Bodnar, U.S. Attorney's Office - FLM, OCALA, FL, Holly Lynn Gershow, U.S. Attorney Service - Middle District of Florida, U.S. Attorney's Office, TAMPA, FL, for Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 6:16-cv-00976-GKS-DCI; 6:13-cr-00005-GKS-GJK-1

Before JORDAN, GRANT and HULL, Circuit Judges.

Opinion

HULL, Circuit Judge:

Alex Cori Tribue, a federal prisoner proceeding with counsel, appeals the district court's denial of his 28 U.S.C. § 2255 motion to vacate his sentence. Tribue argued that his prior Florida conviction for fleeing and eluding in 2006 no longer qualified as a violent felony after *Johnson v. United States*, 576 U.S. ——, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2015), so he was no longer subject to an enhanced sentence under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). Citing *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), the district court ruled that Tribue failed to prove that the ACCA's residual clause affected his sentence because he still had three qualifying serious drug offenses. On appeal, Tribue argues, in relevant part, that the district court erred in relying on his 2007 conviction for delivery of cocaine to sustain his ACCA enhancement because the government waived reliance on the use of that conviction as an ACCA predicate.

[1] After careful review of the parties' briefs and the record, and with the benefit of oral argument, we conclude that the ***1328** government did not waive reliance on Tribue's 2007 conviction for delivery of cocaine, and in the § 2255 proceedings the government permissibly introduced *Shepard*[1] documents to prove the qualifying nature of that 2007 conviction. Thus, we affirm the district court's denial of Tribue's § 2255 motion.[2]

I. BACKGROUND

A. Guilty Pleas

In February 2013, Tribue pled guilty to conspiring to distribute and possess with intent to distribute 500 grams or more of a mixture and substance containing cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(B)(ii), and to possessing a firearm as a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and 924(e)(1). In exchange the government dismissed six charges against Tribue for distributing cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C).

During Tribue's change of plea hearing, his defense counsel predicted, "[b]ased on [Tribue's] criminal record, ... he will be scored as an armed career criminal." Counsel admitted that Tribue had "several deliveries" "of cocaine," yet he was "not by this Plea Agreement waiving his right to challenge any of those predicates." Counsel had advised Tribue that "the 15 years ... in terms of a minimum mandatory penalty, is a worst-case scenario" and, if they were "successful on challenging the armed career criminal [enhancement], it would be a ten-year statutory maximum as a felon in possession of a firearm," but "[e]ither way, [Tribue] would still plead." Defense counsel clarified that his remarks should not "be seen as a concession or abandonment of any legal challenges [he] may have at sentencing, especially since none of the predicates [were] mentioned in [the] Plea Agreement, which [he had] not stipulated to."

B. Presentence Investigation Report

The probation officer's presentence investigation report ("PSI") assigned Tribue a base offense level of 26, pursuant to U.S.S.G. § 2D1.1(c)(7), because Tribue's drug offense involved 624.9 grams of cocaine, which is more than 500 grams but less than 2 kilograms of cocaine.[3] The probation officer designated Tribue as an armed career criminal under the 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." The probation officer applied the enhancement under the ACCA based on Tribue's Florida convictions for: (1) delivery of cocaine in 2003; (2) fleeing and eluding in 2006; and (3) delivery of cocaine in 2009.

The PSI also listed in the criminal history section Tribue's several additional prior Florida convictions, including (1) lewd and lascivious behavior in 2005; (2) possession of a controlled substance in 2005; (3) tampering with physical evidence in 2005; (4) possession of a controlled substance in 2006; (5) solicitation to commit purchase of cocaine in 2007; (6) possession of a controlled substance in July 2007; and (7) possession of a controlled substance in August 2007.

***1329** As a result of Tribue's ACCA status, the PSI increased Tribue's offense level from 26 to 37, pursuant to U.S.S.G. § 4B1.4(b)(2). The PSI then applied a three-level reduction for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1(a) and (b), making Tribue's total offense level 34.

Regardless of his ACCA status, Tribue's criminal history category was VI based on his criminal history score of 22. With a total offense level of 34 and a criminal history category of VI, Tribue's initial advisory guidelines range was 262 to 327 months' imprisonment.

C. Objections

Tribue objected to the PSI, arguing that his 2009 conviction for delivery of cocaine did not count as an ACCA predicate offense because it was "relevant conduct to the instant offense." The probation officer responded that Tribue's 2009 conviction involved a delivery of cocaine on August 26, 2008, and his drug conspiracy charge in the instant case involved separate conduct between June 24, 2012, and November 7, 2012. The government did not file any objections and agreed with the probation officer.

Before sentencing, the government filed a motion under U.S.S.G. § 5K1.1 for the district court to depart downward based on Tribue's substantial assistance. The government recommended that Tribue receive a four-level offense reduction, which would result in an adjusted total offense level of 30 and an adjusted advisory guidelines range of 168 to 210 months' imprisonment.

D. Sentencing Hearing

At the commencement of Tribue's sentencing hearing, the district court asked Tribue whether "there [was] anything regarding the contents of the [PSI] that [he would] like to place on the record," and Tribue's counsel responded "No, Your Honor. There was previously an objection, but it's ... been resolved with the government." Thus, at the sentencing hearing, Tribue withdrew any objection to the ACCA enhancement. The government also responded that there was nothing to do regarding the PSI. Indeed, at sentencing, Tribue did not object to his classification as an armed career criminal.

When the district court invited Tribue to allocute, defense counsel asked to "be heard" on the motion of the government to depart downward. Tribue's counsel requested a four-level offense departure, which would result in an adjusted advisory guidelines range of 168 to 210 months' imprisonment. The government "recommend[ed] the same as [Tribue]," and the district court responded, "All right."

The district court announced that, "under the Presentence Report, [Tribue] ha[s] a total offense level of 34, [and] a criminal history category [of] VI." The district court "note[d] that [Tribue] had 15 prior convictions." "Because of [Tribue] entering a plea of guilty and cooperating with the government, the [District] Court ... t[ook] into consideration the government's motion for substantial assistance and sentence[d] [Tribue] to 170 months in the Bureau of Prisons."

The district court asked if there was anything Tribue would like to state to the court after being sentenced, to which Tribue's counsel responded, "I was going to allocute and Mr. Tribue was going to allocute, but I think the Court has imposed a reasonable sentence in this case, and so there's no objections." The government stated that it had no objections.

The district court did not state which of Tribue's prior convictions it relied on to support Tribue's enhanced sentence under the ACCA. However, in its Statement of Reasons, the district court marked that it adopted the PSI without change.

Tribue did not file a direct appeal.

***1330 E. § 2255 Proceeding**

Later, Tribue filed a § 2255 motion to vacate his sentence. 28 U.S.C. § 2255. He argued that he no longer qualified as an armed career criminal because his Florida conviction in 2006 for fleeing and eluding did not count as a predicate offense after *Johnson*. Tribue did not dispute that his 2003 and 2009 delivery of cocaine convictions qualified as serious drug offenses and ACCA predicates.

However, Tribue asserted that the government effectively waived reliance on the use of any other prior convictions listed in the PSI because (1) the PSI identified only three specific convictions as ACCA predicates, (2) at sentencing, the government did not object to the PSI or state its reliance on any of Tribue's other prior convictions as ACCA predicates, and (3) the sentencing court adopted the PSI without change. In support of his waiver argument, Tribue stressed this Court's decision in *United States v. Canty*, 570 F.3d 1251, 1256 (11th Cir. 2009), where the government specifically waived reliance on the facts that it later sought to assert.

In response, the government emphasized that, although Tribue's conviction in 2006 for fleeing and eluding no longer qualified as a violent felony,[4] he was ineligible for § 2255 relief because he still had three prior convictions that qualified as serious drug offenses. *See* *Beeman*, 871 F.3d at 1221. In addition to Tribue's 2003 and 2009 delivery of cocaine convictions, the government submitted that Tribue also had a 2007 delivery of cocaine conviction that qualified too. As a *Shepard* document, the government attached to its response a certified copy of the Florida judgment in Tribue's 2007 case that showed he had been adjudicated guilty of "Delivery of Cocaine" on June 26, 2007.[5] The government argued that it could now rely on this 2007 conviction for delivery of cocaine to support Tribue's ACCA enhancement and that it never waived reliance on that conviction.

Regarding *Canty*, the government pointed out that: (1) in the original *Canty* sentencing, the defendant had objected to the predicate convictions used for his ACCA enhancement and the government had explicitly and vocally disclaimed reliance on any other facts to show the convictions qualified; (2) there was no such similar objection or discussion at Tribue's original sentencing; and (3) a sentencing court is not required to address and rule upon every possible qualifying predicate conviction listed in the PSI for those convictions to count later as ACCA predicates on direct appeal or on collateral review.

The district court denied Tribue's § 2255 motion. The district court concluded, in relevant part, that Tribue could not meet his burden of proof under *Beeman* to demonstrate that he no longer qualified for an ACCA enhancement because he still had three qualifying serious drug offenses. The district court found that, unlike in *Canty*, here the government never waived ***1331** or disclaimed reliance on *Shepard* documents or other records demonstrating the nature of Tribue's prior convictions contained in the PSI. The district court also denied Tribue a certificate of appealability ("COA").

Tribue filed a timely appeal. This Court granted Tribue a COA on "[w]hether the district court erred in denying relief under 28 U.S.C. § 2255 by determining that Tribue was still subject to the Armed Career Criminal enhancement, 18 U.S.C. § 924(e)(1)."

II. DISCUSSION

A defendant who violates 18 U.S.C. § 922(g) and has three or more previous convictions for a violent felony or serious drug offense is subject to an enhanced sentence under the Armed Career Criminal Act. *See* 18 U.S.C. § 924(e)(1); U.S.S.G. § 4B1.4(a). The sentencing enhancement is mandatory where a defendant has at least three predicate offenses. *See* *United States v. Symington*, 781 F.3d 1308, 1313 (11th Cir. 2015) (holding that, because "application of the ACCA is mandatory when a defendant meets the statutory requirements," the district court did not err by sentencing

him to 15 years of imprisonment notwithstanding the 10-year maximum sentence agreed to in his plea agreement).

A. *Beeman*

[2] "[L]ike any other § 2255 movant, a *Johnson* § 2255 claimant must prove his claim." *Beeman*, 871 F.3d at 1221-22 (citing "a long line of authority holding that a § 2255 movant 'bears the burden to prove the claims in his § 2255 motion.' "). To obtain relief based on *Johnson*, a postconviction movant must prove that his sentence "enhancement was due to use of the residual clause." *Id.* at 1222. "In other words, he must show that the clause actually adversely affected the sentence he received." *Id.* at 1221. A *Johnson* § 2255 movant must prove two things: (1) that "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," and (2) that "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." *Id.*

As to this first requirement, *Beeman* added that "[t]o 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." *Id.* at 1222. *Beeman* explained that "[i]f 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." *Id.*

Here, we can decide this case easily based on Tribue's failure to prove the second requirement of *Beeman*. *See id.* at 1221. Tribue's PSI provided that he had Florida convictions in 2003 and 2009 for delivering cocaine, which qualify as serious drug offenses under the ACCA. *See* 18 U.S.C. § 924(e)(2)(A)(ii) (defining a "serious drug offense" as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance," punishable by at least ten years of imprisonment); *United States v. Smith*, 775 F.3d 1262, 1268 (11th Cir. 2014) (holding that a drug conviction under Fla. Stat. § 893.13(1) is a "serious drug offense" under the ACCA).[6] In this appeal, Tribue ***1332** does not dispute that these cocaine delivery convictions qualify as ACCA predicates.

[3] The problem for Tribue is that he also had a Florida conviction in 2007 for delivering cocaine, which likewise qualifies as an ACCA predicate. Therefore, Tribue had at least three prior convictions that qualified as "serious drug offenses" under the ACCA. Accordingly, Tribue has not proven that there were not other convictions that could have qualified, and thus Tribue is not eligible for § 2255 relief under *Johnson* and *Beeman*. *See* *Beeman*, 871 F.3d at 1221.[7]

B. Waiver

Tribue's main argument is that the government effectively waived reliance on the use of any other convictions outside of the three identified as ACCA predicates in the PSI. Tribue argues that the government cannot now rely on his 2007 conviction for delivery of cocaine because: (1) his PSI expressly stated the ACCA enhancement was based on three specific prior convictions, one of which was the 2006 fleeing and eluding conviction; (2) the government did not file PSI objections or state that he had additional ACCA predicates; and (3) the district court adopted the PSI without change. Tribue contends that the government should not now be given a second chance to rely on a new ACCA predicate.

[4] We are not persuaded by Tribue's arguments. Rather, strong reasons exist for allowing the government to rely on Tribue's additional drug conviction and to present evidence about it in his § 2255 proceedings.

First, at the original sentencing before the district court, Tribue admitted that he had all of the convictions listed in the PSI. So the factual existence of Tribue's 2007 drug conviction was not disputed at the original sentencing.

Second, at the original sentencing, Tribue raised no objection to his ACCA enhancement. For example, at sentencing Tribue never claimed that his 2006 fleeing and eluding conviction did not qualify under the ACCA's elements clause or that the

residual clause was void for vagueness. This reason alone suffices.

Third, there is no requirement that the government prospectively address whether each and every conviction listed in the criminal history section of a PSI is an ACCA predicate in order to guard against potential future changes in the law and avoid later claims that it has waived use of those convictions as qualifying ACCA predicates. In other words, where there is no objection by the defendant to the three convictions identified as ACCA predicates, the government bears no burden to argue or prove alternative grounds to support the ACCA enhancement. If Tribue had no way to anticipate *Johnson*'s invalidation of the residual clause in the ACCA, and therefore did not object, then the government equally did not either. Further, the government did not waive reliance on other convictions in the PSI as ACCA predicates simply by not objecting to the PSI on the grounds that Tribue had more qualifying convictions than the three that the probation officer had identified as supporting the ACCA enhancement.

***1333 C. Other Precedent**

We recognize that Tribue relies on *Canty* and *Bryant*.[8] However, in both cases, the defendants expressly objected to their ACCA classification at the original sentencing. That alone makes those cases materially different and not helpful to Tribue. In addition, in each case the government's particular conduct in response to the defendant's timely objection laid the foundation for the waiver ruling in those cases. We discuss what happened in those cases and why.

In *Canty*, at the original sentencing hearing, the defendant objected both to the facts of his prior convictions in the PSI and the use of his prior convictions as ACCA predicates. 570 F.3d at 1253-54. The government expressly disclaimed reliance on the facts in the PSI taken from various documents and instead offered limited *Shepard* exhibits (certified copies of state convictions) to demonstrate that the defendant had the requisite prior ACCA predicates. *Id.* at 1253. The convictions were: (1) a 2002 Florida felon in possession of a firearm, carrying a concealed firearm, and obstructing or opposing an officer; (2) a 1998 Florida escape while transporting, possession of cocaine, and obstructing or opposing an officer with violence; (3) a 1998 Florida possession of cocaine with intent to sell or deliver; and (4) a 1995 Florida carrying a concealed firearm and possession of a weapon in the vicinity of a school. *Id.*

On direct appeal in *Canty*, this Court determined that the defendant's convictions for carrying a concealed weapon did not qualify as violent felonies, and his crimes of escape and obstructing justice with violence occurred on the same day and thus could not both be used. *Id.* at 1255. Further, because the government, in response to the defendant's timely objection, had disclaimed reliance on any facts in the PSI taken from documents other than the *Shepard* exhibits, this Court (1) declined to consider on appeal the PSI facts regarding the circumstances of the above escape and obstructing justice convictions and (2) rejected the government's argument for a second chance to present more evidence about those very same convictions on remand. *Id.* at 1256-57.[9]

Tribue's case is nothing like *Canty*. Tribue did not object to his ACCA classification at the original sentencing, and the government did not expressly disclaim reliance on the facts in the PSI.

Similar to *Canty*, the defendant in *Bryant* also objected to his ACCA classification at the original sentencing. ***1334** *Bryant v. Warden, FCC Coleman-Medium*, 738 F.3d 1253, 1258 (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). The government countered that the defendant had "5 or 6 felony convictions which also could have been used" as predicates. *Id.* at 1258-59. The district court thoroughly reviewed all of the defendant's prior convictions because of the government's representation that there were other felonies which could have been used. *Id.* at 1259. One of the convictions listed in the PSI was burglary. *Id.* at 1258. After its thorough review of the convictions, the district court found that the defendant had "at most three qualifying predicate convictions," which were a concealed-firearm conviction and two drug convictions. *Id.* at 1259, 1279 (emphasis added). Importantly, the government did not object to that finding or suggest at any point at sentencing that a prior burglary conviction could serve as a predicate offense. *Id.* Therefore, based

on those factual circumstances, this Court determined that the government waived reliance on the defendant's burglary conviction as the third ACCA predicate at sentencing. *Id.* at 1279.

Unlike the defendant in *Bryant*, Tribue did not object to his ACCA classification at his original sentencing. And unlike the factual circumstances in *Bryant*, the sentencing court here did not review all of Tribue's convictions, much less make any finding about all of them. [10] Neither *Canty* nor *Bryant* help Tribue.

III. CONCLUSION

In sum, because Tribue has three prior convictions that qualified as "serious drug offenses" under the ACCA, he has not shown that he is eligible for § 2255 relief under *Johnson*. Thus, we affirm the district court's denial of Tribue's § 2255 motion.

AFFIRMED.

All Citations

929 F.3d 1326, 27 Fla. L. Weekly Fed. C 2151

Footnotes

1 *Shepard v. United States*, 544 U.S. 13, 125 S. Ct. 1254, 161 L.Ed.2d 205 (2005).

2 In reviewing a denial of a motion to vacate under § 2255, we review the district court's legal conclusions *de novo* and its findings of fact for clear error. *Stoufflet v. United States*, 757 F.3d 1236, 1239 (11th Cir. 2014). " '[W]e may affirm on any ground supported by the record.' " *Beeman*, 871 F.3d at 1221 (quoting *Castillo v. United States*, 816 F.3d 1300, 1303 (11th Cir. 2016)).

3 The probation officer prepared the PSI using the 2012 United States Sentencing Guidelines Manual.

4 The parties agree that Tribue's prior Florida conviction in 2006 for fleeing and eluding does not qualify as a predicate violent felony under the ACCA. *See* *United States v. Adams*, 815 F.3d 1291, 1292-93 (11th Cir. 2016) (holding that, after *Johnson*, a Florida conviction for fleeing or attempting to elude is no longer an ACCA-qualifying offense because it does not qualify under the elements or enumerated-offenses clauses).

5 The conviction in 2007 for delivery of cocaine was originally listed in Tribue's PSI as "solicitation to commit purchase of cocaine," but the government introduced a certified copy of the state court judgment in Tribue's § 2255 proceeding verifying that the conviction was for delivery of cocaine. Both the PSI and the certified copy of the state court judgment identify the conviction as Case No. 07-CF-2641 in the Orange County Circuit Court on June 26, 2007.

6 *See* Fla. Stat. § 893.13(1)(a) (providing that "a person may not sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance"). A delivery of cocaine conviction constitutes a second-degree felony, punishable by up to 15 years of imprisonment. Fla. Stat. §§ 893.13(1)(a)(1), 775.082(3)(d), 893.03(2)(a)(4).

7 Although the district court's order in Tribue's § 2255 proceeding incorrectly identified Tribue's third ACCA predicate as a 2005 conviction, the record established that Tribue's third cocaine delivery conviction was in 2007. We may affirm on any ground supported by the record. *Beeman*, 871 F.3d at 1221.

8 *Bryant v. Warden, FCC Coleman-Medium*, 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).

9 After *Canty*, in *United States v. Martinez*, 606 F.3d 1303, 1305 (11th Cir. 2010), another direct appeal case, this Court limited *Canty* to its facts and explained that *Canty* did not hold "that an appellate panel was barred from fashioning an appropriate mandate, including allowing the government to present additional evidence on remand for resentencing." In *Martinez*, this Court read *Canty* to "say only that a broad mandate for *de novo* resentencing was inappropriate in that case" because the government had explicitly disclaimed reliance on other evidence at the original sentencing. *Id.*
Further, in *Martinez*, this Court held that "there were powerful reasons to allow the government to present additional evidence" on remand in that case. *Id.* at 1306. This Court explained that the defendant's objection at the sentencing hearing to a sentencing enhancement was "vague and unclear" and, therefore, under the circumstances of the case, "a 'just' mandate allowed the government to introduce evidence upon remand." *Id.* This Court held that it "had the lawful power to fashion an appropriate form of relief on remand, including permitting the presentation of further evidence." *Id.*

10 In *United States v. Petite*, 703 F.3d 1290, 1292 n.2 (11th Cir. 2013), this Court concluded that a fleeing and eluding offense counted as an ACCA predicate, and thus, the Court said it need not reach the government's claim that it could substitute a different conviction. The Court's statements in a footnote in *Petite* that the government on appeal cannot offer a new predicate conviction in support of an ACCA enhancement are pure dicta. In any event, the defendant in *Petite* had objected at sentencing and on direct appeal that the fleeing and eluding offense did not count substantively under the residual clause, which also materially distinguishes *Petite* from this case. *See* *id.* at 1292.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10579-C

ALEX CORI TRIBUE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Alex Cori Tribue moves for a certificate of appealability ("COA") in order to appeal the denial of his 28 U.S.C. § 2255 motion to vacate his sentence. 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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

A review of Tribue's § 2255 motion and his motion for a COA shows that he has made a substantial showing of the denial of a constitutional right with regard to his claims that the government disclaimed reliance on his third delivery of cocaine conviction for purposes of his Armed Career Criminal enhancement. Therefore, Tribue's motion for a COA is GRANTED on the following issue:

Whether the district court erred in denying relief under 28 U.S.C. § 2255 by determining that Tribue was still still subject to the Armed Career Criminal enhancement, 18 U.S.C. § 924(e)(1)?

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ALEX CORI TRIBUE,

Petitioner,

v.

CASE NO. 6:16-cv-976-Orl-18DCI
(6:13-cr-5-Orl-18GJK)

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

This cause is before the Court on an amended motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 filed by Alex Cori Tribue (Doc. 7) and supporting memorandum of law (Doc. 19). The Government filed a response to the § 2255 motion in compliance with this Court's instructions and with the *Rules Governing Section 2255 Proceedings for the United States District Courts*. (Doc. 20). Petitioner filed a reply to the response (Doc. 21).

Petitioner alleges one claim for relief in his § 2255 motion, that he was sentenced above the statutory maximum in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015) (holding the residual clause of the Armed Career Criminal Act's definition of "violent felony" is unconstitutionally vague). For the following reasons, the Court concludes that Petitioner is not entitled to relief.

I. PROCEDURAL HISTORY

Petitioner was charged by indictment with conspiracy to possess and distribute

500 grams or more of cocaine and marijuana in violation of 21 U.S.C. §841(b)(1)(B)(ii) and (b)(1)(D) (Count One), five counts of possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) (Counts Two, Three, Four, Five, and Eight), one count of aiding and abetting in the possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) (Count Six), and possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1), 9242(a)(2), and 924(e)(1) (Count Nine) (Criminal Case 6:13-cr-5-Orl-18GJK, Doc. 1).[1] Petitioner entered a guilty plea to Counts One and Nine (Criminal Case Doc. 40). The Magistrate Judge entered a report and recommendation, recommending the Court accept the guilty plea (Criminal Case Doc. 46). The Court accepted the plea and adjudicated Petitioner guilty (Criminal Case Doc. 56). Petitioner was sentenced pursuant to the Armed Career Criminal Act ("ACCA") to two terms of 170 months in prison to be followed by eight years of supervised release (Criminal Case Doc. 75). Petitioner did not appeal.

II. LEGAL STANDARD

Section 2255 provides federal prisoners with an avenue for relief under limited circumstances:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence,

[1] Hereinafter Criminal Case No. 6: 6:13-cr-5-Orl-18GJK will be referred to as "Criminal Case."

> or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence

28 U.S.C. § 2255. If a court finds a claim under Section 2255 to be valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." *Id.* To obtain this relief on collateral review, however, a petitioner must clear a significantly higher hurdle than would exist on direct appeal. *See United States v. Frady*, 456 U.S. 152, 166 (1982) (rejecting the plain error standard as not sufficiently deferential to a final judgment).

III. ANALYSIS

Petitioner alleges that he is entitled to resentencing pursuant to *Johnson*, 135 S. Ct. 2551 (2015), because he no longer has the requisite prior convictions to qualify under the ACCA (Doc. 19 at 2-3). Petitioner asserts that his prior conviction for fleeing and eluding in the State of Florida no longer qualifies as a violent felony, and therefore, he does not have three predicate convictions under the ACCA. *Id.* at 3.

Section 924(e) requires the Court to impose a 15-year minimum mandatory sentence for any convicted felon who possesses a firearm or ammunition after have been convicted of three violent felonies or serious drug offenses. 18 U.S.C. § 924(e)(1). The term violent felony is defined as any crime punishable by imprisonment for a term exceeding one year and has (1) an element of the use, attempted, use, or threatened use of physical force against another person, or (2) is burglary, arson, extortion, involves the 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 Presentence Investigation Report ("PSR") list the following prior felonies used to enhance Petitioner's sentence: (1) a 2003 conviction for delivery of cocaine; (2) a 2006 conviction for fleeing and eluding; and (3) a 2009 conviction for delivery of cocaine (PSR at 13, ¶ 41). The Eleventh Circuit has held that a conviction for fleeing or attempting to elude does not qualify as a violent felony under the ACCA. *See United States v. Adams*, 815 F.3d 1291, 1292-93 (11th Cir. 2016).

Petitioner argues that in light of *Adams*, he no longer qualifies for an ACCA sentence. In support of this claim, Petitioner contends that because the PSR only listed three prior convictions under the Chapter Four Enhancements section, the Government cannot rely on any of his other prior convictions (Doc. 19 at 3). Petitioner asserts that Government was required to state at sentencing that it was relying on any additional prior convictions outside those that were expressly identified in paragraph 41 of the PSR (Doc. 19 at 3-6). The Government argues that it did not "explicitly disclaim reliance on any particular convictions, nor did it waive its ability to rely upon [Petitioner's] qualifying convictions during resentencing" (Doc. 20 at 13).

In *United States v. Canty*, 570 F.3d 1251, 1253 (11th Cir. 2009), the PSR listed the defendant's prior convictions but "did not specify which of these convictions were violent felonies or serious drug offenses." The Government offered *Shephard* documents to demonstrate that Petitioner had the requisite prior convictions. *Id.* The trial court did

not make findings regarding which of the convictions qualified as violent felonies or serious drug offenses or which convictions it was relying upon. *Id.* at 1254.

The Eleventh Circuit found that the petitioner's convictions for carrying a concealed weapon did not qualify as violent felonies. *Id.* The appellate court concluded that the petitioner no longer qualified for ACCA sentencing because his crimes of escape and obstructing justice with violence, if violent felonies, occurred on the same day and thus could not both be used. *Id.* The appellate court further stated that the Government could not argue the circumstances of those convictions because it had previously waived or disclaimed reliance on any facts outside of the *Shephard* documents. *Id.* at 1256-57. Contrary to *Canty*, in this case the Government did not expressly rely on or waive reliance on any *Shephard* documents or other records demonstrating the nature of Petitioner's prior convictions.

In *Bryant v. Warden, FCC Coleman-Medium*, 738 F.3d 1253, 1279 (11th Cir. 2013), *overruled on other grounds by McCarthan v. Director of Goodwill Instrutries-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir. 2017), the Eleventh Circuit noted that the government could not rely on a burglary conviction for ACCA purposes because it had waived the use of that conviction at sentencing. 738 F.3d at 1279. The court stated that the district court judge expressly found that the petitioner had three qualifying predicate convictions: carrying a concealed firearm and two drug convictions. *Id.* The appellate court stated that because the government did not object to these findings or "suggest at any point that . . . [the] burglary conviction could serve as a § 924(e)-qualifying conviction" that it could not now

rely on that conviction. *Id.* (citing *Canty*, 570 F.3d at 1257).

Similarly, in *Jasmin v. United States*, No. 3:16-cv-761-J-32JBT, 2016 WL 6071663, at *7 (M.D. Fla. Oct. 17, 2016), the petitioner also challenged his ACCA sentence. 2016 WL 6071663, at *2. The district court noted that the parties relied upon three prior convictions, including a conviction for kidnapping, at sentencing. In his § 2255 motion, the petitioner argued that kidnapping is not a violent felony. *Id.* The Government argued that even if kidnapping was not a violent felony, the petitioner's ACCA sentence was proper because he was also convicted of possession of cocaine while armed, which is a serious drug offense. *Id.* at *7. The court disagreed, holding that the Government could not rely on this prior conviction because it expressly disclaimed reliance on that conviction during the sentencing proceeding. *Id.* Unlike *Bryant* and *Jasmin*, in the instant case the Court did not expressly state which prior convictions it was relying on for the ACCA. Furthermore, at no point did the Government waive or disclaim reliance on any of Petitioner's prior convictions contained in the PSR.

In *United States v. Maida*, 650 F. App'x 682 (11th Cir. 2016), the appellate court noted that during the sentencing proceeding, the government appeared to concede or agree that a prior burglary conviction did not qualify as an enumerated felony under § 924(e)(2)(B) because it only argued that the conviction qualified under the ACCA's residual clause. 650 F. App'x at 683. The Eleventh Circuit concluded that the Government was prohibited from now arguing that burglary qualified as a crime of violence under the enumerated clause because it solely relied on the residual clause during sentencing. *Id.* at 685. The

Maida case can also be contrasted from the facts in this case. As noted above, the neither the parties nor the Court indicated which prior convictions it relied upon for ACCA sentencing purposes. Furthermore, the Government did not expressly argue that Petitioner's prior convictions qualified under the residual clause.

Petitioner cannot meet his burden of demonstrating that he no longer qualifies for an ACCA sentence. *See Beeman v. United States*, 871 F.3d 1215, 1223-25 (11th Cir. 2017) (noting the in a § 2255 proceeding, the movant has the burden of proof and persuasion to show that he is entitled to relief). Although his prior conviction for fleeing and eluding no longer qualifies as a predicate conviction, Petitioner has three qualifying serious drug offenses (a 2003 delivery of cocaine conviction, a 2005 sale or delivery of cocaine conviction, and a 2008 delivery of cocaine conviction). The parties and the Court did not expressly state which convictions were used as qualifying predicate convictions. In *Beeman*, the Eleventh Circuit held that when the "evidence does not clearly explain what happened. . . . the party with the burden loses" because he cannot show that the sentencing court relied on the residual clause in imposing an ACCA sentence. 871 F.3d at 1125 (citing *Romine v. Head*, 253 F.3d 1349, 1357 (11th Cir. 2001)). Petitioner cannot show that it is more likely than not that he was in fact sentenced as an armed career criminal under the residual clause, or that but for the residual clause, he would have received a different sentence. Accordingly, Petitioner is not entitled to relief on his claim.

Any of Petitioner's allegations not specifically addressed herein are without merit.

IV. 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). Petitioner fails to make such a showing. Thus, the Court will deny Petitioner a certificate of appealability.

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

1. Petitioner's amended motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 (Doc. 7) is **DENIED**.

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

3. The Clerk of Court is directed to file a copy of this Order in criminal case number 6:13-cr-5-Orl-18GJK and to terminate the motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 (Criminal Case Doc. 133) pending in that case.

4. Petitioner is **DENIED** a certificate of appealability.

DONE AND ORDERED in Orlando, Florida, this 13 day of December, 2017.

G. KENDALL SHARP
SENIOR UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record