[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 16-15711

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D.C. Docket Nos. 0:16-cv-61390-WPD,
0:10-cr-60277-WPD-1

CHRISTOPHER BROOKS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

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(January 22, 2018)

Before MARTIN, JORDAN, and WALKER,[*] Circuit Judges.

MARTIN, Circuit Judge:

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[*] Honorable John M. Walker, Jr., United States Circuit Judge for the Second Circuit, sitting by designation.

Christopher Brooks appeals the dismissal of his 28 U.S.C. § 2255 motion. The certificate of appealability ("COA") for his case sets out a single issue for us to consider on appeal: "[w]hether the district court erred in dismissing Mr. Brooks's 28 U.S.C. § 2255 motion as time-barred under § 2255(f)(3) on the grounds that his claim was not based on Johnson v. United States, 135 S. Ct. 2551 (2015)."

## I. Background

On January 21, 2011, Mr. Brooks pled guilty to possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g). On April 1, 2011, he was sentenced to the mandatory-minimum sentence of fifteen-years imprisonment under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1). The ACCA requires a sentence of no less than fifteen years for a defendant who violates § 922(g) and has three or more convictions for a "violent felony" or a "serious drug offense." 18 U.S.C. § 924(e)(1). The ACCA defines a "violent felony" to include any crime that "involves conduct that presents a serious potential risk of physical injury to another." Id. § 924(e)(2)(B)(ii). This part of the violent-felony definition is known as the "residual clause." See Mays v. United States, 817 F.3d 728, 730–31 (11th Cir. 2016) (per curiam). The remaining portions of the violent-felony definition are known as the "enumerated clause" and the "elements clause." Id. at 731.

Mr. Brooks's ACCA sentence was based on three earlier felony convictions: (1) a 1996 conviction in Florida for attempted first degree murder; (2) a 2009 conviction in Florida for possession with intent to deliver cocaine; and (3) a 2009 conviction in Florida for aggravated assault. Mr. Brooks appealed his federal conviction for being a felon in possession of a firearm, and on November 22, 2011, a panel of this Court affirmed. See United States v. Brooks, 448 F. App'x 27, 28 (11th Cir. 2011) (per curiam) (unpublished). On March 19, 2012, the Supreme Court denied certiorari. See Brooks v. United States, 565 U.S. 1274, 132 S. Ct. 1779 (mem.) (2012).

Then, on June 26, 2015, the Supreme Court issued the Johnson decision, which held that the residual clause of the ACCA is unconstitutionally vague. Johnson, 135 S. Ct. at 2563. The Supreme Court then went on to hold that the Johnson decision is retroactively applicable to cases on collateral review. Welch v. United States, 578 U.S. ___, 136 S. Ct. 1257, 1268 (2016).

On June 24, 2016, Mr. Brooks filed a motion to correct his sentence under 28 U.S.C. § 2255. He argued that, in light of Johnson, he "no longer has three qualifying predicate convictions" and therefore "is no longer an armed career criminal." His motion made repeated references to Johnson. He argued that, after Johnson, his convictions for aggravated assault and attempted first degree murder no longer qualified as ACCA predicate offenses.

The District Court dismissed Mr. Brooks's motion, sua sponte, finding that it was not timely because it was not actually based on Johnson, but was instead based on Descamps v. United States, 570 U.S. 254, 133 S. Ct. 2276 (2013). The District Court alternatively denied the motion on the merits, finding that aggravated assault and attempted first degree murder both qualify as ACCA predicates.

Mr. Brooks appealed, and this Court granted a COA on the question of whether his § 2255 motion was timely.

## II. Legal Standard

A district court's determination that a § 2255 motion is time-barred is reviewed de novo. Drury v. United States, 507 F.3d 1295, 1296 (11th Cir. 2007).

A § 2255 motion is timely if it is filed within one year of the latest of four possible triggering dates. 28 U.S.C. § 2255(f). The triggering date relevant to this case is "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." Id. § 2255(f)(3). It is not disputed that the Johnson decision constituted a newly recognized right that has been made to apply retroactively on collateral review. See Welch, 136 S. Ct. at 1268.

After Mr. Brooks's case was set for oral argument, a panel of this Court decided Beeman v. United States, 871 F.3d 1215 (11th Cir. 2017).[1] Like Mr. Brooks's case, Beeman also involved a § 2255 motion that purported to rely on Johnson but was dismissed because the District Court found it was actually based on Descamps. Beeman, 871 F.3d at 1218–19. The Beeman panel clarified that a claim based on Descamps would not trigger the one-year limitations provision of 28 U.S.C. § 2255(f)(3), but a claim based on Johnson would. Id. at 1220. To distinguish between the two, the panel explained that "[a] Johnson claim contends that the defendant was sentenced as an armed career criminal under the residual clause, while a Descamps claim asserts that the defendant was incorrectly sentenced . . . under [the other] clause[s]." Id. The panel found that Mr. Beeman had raised a timely Johnson claim because he argued that his offense "historically qualified as an ACCA predicate under the ACCA's residual clause," and because he filed his motion just before the one-year anniversary of the Johnson decision. Id. at 1220–21 (alteration adopted). The panel then proceeded to consider the merits of the Johnson claim. Id. at 1221.

[1] Although the Beeman mandate has not issued, it is binding in this circuit. Martin v. Singletary, 965 F.2d 944, 945 n.1 (11th Cir. 1992); 11th Cir. R. 36 (I.O.P. 2) ("Under the law of this circuit, published opinions are binding precedent. The issuance or non-issuance of the mandate does not affect this result.").

## III. Analysis

The critical question for Mr. Brooks's appeal is whether his motion raised a Johnson claim, or whether he merely raised a claim under Descamps. The Beeman decision requires us to evaluate whether Mr. Brooks "contends that [he] was sentenced . . . under the residual clause," id. at 1220, and we conclude that he does.

Mr. Brooks makes repeated references in his motion to Johnson and the fact that the invalidation of the residual clause created a newly recognized right. He explained that, in light of Johnson, he "no longer has three qualifying predicate convictions" and therefore "is no longer an armed career criminal." The most natural reading of his motion is that Johnson impacted whether or not he qualified as an armed career criminal, which we read as his assertion that he was sentenced based on the residual clause. Also, we are aware that the Beeman panel considered that Mr. Beeman's § 2255 motion was filed "19 days before the one-year anniversary of the Johnson decision," which the panel accepted as an indication of Mr. Beeman's desire to bring a timely Johnson claim. Beeman, 871 F.3d at 1221. Similarly, Mr. Brooks filed his motion on June 24, 2016, just before the one-year anniversary of the Johnson decision. Like the panel in Beeman, we accept the timing of Mr. Brooks's filing as evincing a desire to plead a Johnson claim.

The government argues that Mr. Brooks's motion failed to raise a Johnson claim because he did not explicitly state that his sentence was based on the residual

clause. But motion practice is not talismanic, and we do not require petitioners to recite magic words. See, e.g., Urquilla-Diaz v. Kaplan Univ., 780 F.3d 1039, 1054 (11th Cir. 2015) ("[W]e conclude that Diaz's failure to include the adverb solely—a word with no talismanic power—is not enough to preclude the inference that he pleaded a plausible violation of the False Claims Act."); Akanthos Capital Mgmt., LLC v. Atlanticus Holdings Corp., 734 F.3d 1269, 1272 (11th Cir. 2013) (per curiam) (rejecting the argument that a motion waived certain rights just because it "did not include the magic words 'res judicata'"); see also United States v. Thompson, 422 F.3d 1285, 1305 (11th Cir. 2005) (Tjoflat, J., concurring) (explaining that a legal test predicated on a sentencing judge's utterance of magic words "is as arbitrary as it is absurd"). Considering Mr. Brooks's motion as a whole, with its repeated references to Johnson, it is reasonably read to advocate that Mr. Brooks was sentenced under the residual clause.

Finding that the motion was timely does not end our inquiry. In Beeman, after the panel held the District Court erred in finding the motion untimely, it evaluated the merits of the Johnson claim because Mr. Beeman said the factual record was sufficient to support his claim. Beeman, 871 F.3d at 1221. Here, Mr. Brooks has made no such suggestion. Instead, he seeks to address the merits of his claim in district court.

The District Court did make an alternative finding that Mr. Brooks's prior offenses still qualify as ACCA predicate offenses after Johnson. However, the District Court did not have an opportunity to apply the new standard articulated by Beeman, which requires a petitioner to show it is more likely than not that he was sentenced "solely on the residual clause," id. at 1221–22, which the panel explained is "a historical fact." Id. at 1224 n. 5. Relevant to this inquiry will be the fact that, at the time Mr. Brooks was sentenced, this Court had held that a conviction under Arizona's aggravated assault statute—which is similar to Florida's aggravated assault statute—did not qualify under either the elements clause or the enumerated clause of the ACCA.[2] See United States v. Palomino Garcia, 606 F.3d 1317, 1333–34, 1337 (11th Cir. 2010). Should Mr. Brooks prevail under this "historical fact" test, he would then need to show that his attempted murder conviction is not an ACCA predicate offense. That remains an open question in this Circuit.[3]

[2] Since then, this Court has held that Florida aggravated assault qualifies as an ACCA predicate offense under the elements clause. Turner v. Warden, 709 F.3d 1328, 1338–39 (11th Cir. 2013); see also In re Rogers, 825 F.3d 1335, 1341 (11th Cir. 2016) (per curiam) (holding that Turner remains binding post-Johnson). But because Turner was decided after Mr. Brooks was sentenced, it is not relevant for Beeman's "historical fact" test. See Beeman, 871 F.3d at 1224 n.5.

[3] The District Court cited United States v. Rolon, 445 F. App'x 314 (11th Cir. 2011) for the proposition that attempted first degree murder is a predicate ACCA offense. Rolon is an unpublished opinion and therefore has no binding precedential effect. See 11th Cir. R. 36-2. Beyond that, Rolon involved the definition of "serious violent felony" under 18 U.S.C. § 3559, as opposed to the "violent felony" definition of the ACCA. Rolon, 445 F. App'x at 331. Neither

Neither party has fully briefed the merits issue to the Court.[4] Remand is appropriate to allow the District Court an opportunity to analyze Mr. Brooks's claims in a manner consistent with Mays and Beeman. See, e.g., Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1203 (11th Cir. 2015) (remanding after this Court adopted a new legal test "[t]o allow the district court to apply this test in the first instance and, if the district court desires, to give the parties an opportunity to further develop the record to address the components of the test"). We therefore decline to expand the COA to include the District Court's merits finding. See Hodges v. Att'y Gen., Fla., 506 F.3d 1337, 1341 (11th Cir. 2007) (recognizing that a panel can expand the COA in an "extraordinary" case).

## IV. Conclusion

Mr. Brooks's § 2255 motion is timely, and we remand this case to the District Court for proceedings consistent with this opinion.

**REVERSED AND REMANDED.**

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did the Court in Rolon ever squarely address the status of attempted murder under Florida law because Mr. Rolon had multiple other felony convictions to support his sentence. Id.

[4] The government has never briefed the merits issue because the District Court dismissed Mr. Brooks's motion sua sponte, before the government could file a response.

JORDAN, Circuit Judge, concurring.

I conclude that Mr. Brooks has properly (and timely) raised a claim under *Johnson v. United States*, 135 S. Ct. 2551 (2015). At the time of his sentencing we had held that a conviction under Arizona's aggravated assault statute did not qualify as a predicate offense under either the elements clause or the enumerated offense clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e). *See United States v. Palomino Garcia*, 606 F.3d 1317, 1333-34 (11th Cir. 2010). Because Arizona's aggravated assault statute is similar to Florida's aggravated assault statute, it seems to me that, absent any mention or discussion of the ACCA's elements clause, the district court relied solely on the ACCA's residual clause in ruling that Mr. Brooks' Florida aggravated assault conviction was a predicate ACCA offense. *See Beeman v. United States*, 871 F.3d 1215, 1221-22 (11th Cir. 2017).

Although the Florida aggravated assault conviction opens the door for Mr. Brooks to seek relief under *Johnson*, our current precedent holds that such a conviction qualifies under the ACCA's elements clause. *See Turner v. Warden*, 709 F.3d 1328, 1337-38 & n.6 (11th Cir. 2013). I would therefore affirm the district court's alternative ruling that Florida aggravated assault is an ACCA predicate offense, and see no reason to remand on that issue.

As for Mr. Brooks' Florida conviction for attempted first-degree murder, I agree that a remand is warranted notwithstanding the district court's alternative ruling on the merits. Because there is no binding circuit precedent on the matter, the district court should not have summarily rejected Mr. Brooks' claim without allowing the parties to be heard. *See* Rule 4(b) of the § 2255 Rules; *Blackledge v. Allison*, 431 U.S. 63, 74-75 (1977).