

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13929
Non-Argument Calendar

D.C. Docket Nos. 1:16-cv-02369-ELR,
1:11-cr-00251-ELR-JFK

CEDRIC LAMONT ROBINSON,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(December 3, 2019)

Before MARCUS, WILLIAM PRYOR, and ANDERSON, Circuit Judges.

PER CURIAM:

Cedric Robinson, a *pro se* federal prisoner serving a total 180-month sentence for being a felon in possession of a firearm, appeals the denial of his

28 U.S.C. § 2255 motion to vacate. The sentencing court enhanced his sentence, pursuant to the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e), because he had prior Georgia convictions for aggravated battery, sale and distribution of cocaine, robbery by intimidation, and possession of marijuana with the intent to distribute. Robinson argues in his initial appellate brief that his aggravated battery and robbery by intimidation convictions do not qualify as ACCA predicate offenses in light of *Descamps v. United States*, 570 U.S. 254 (2013), and *Johnson v. United States*, 135 S. Ct. 2551 (2015). Robinson also argues in his reply brief that only one of his prior drug convictions qualifies as an ACCA predicate.

In reviewing a district court’s denial of a 28 U.S.C. § 2255 motion to vacate, we review *de novo* the district court’s legal conclusions and review for clear error the district court’s factual findings. *Spencer v. United States*, 773 F.3d 1132, 1137 (11th Cir. 2014) (*en banc*). We also review *de novo* the district court’s determination about whether a § 2255 motion is time-barred. *Drury v. United States*, 507 F.3d 1295, 1296 (11th Cir. 2007).

This Court granted a certificate of appealability (“COA”) on the issue of whether the district court erred in denying relief under 28 U.S.C. § 2255 by determining that Robinson was subject to an ACCA enhancement.

Procedural issues that must be resolved before we can address the underlying claim specified in a certificate of appealability (“COA”) are presumed to be encompassed in the COA. *McCoy v. United States*, 266 F.3d 1245, 1248 n.2 (11th Cir. 2001) (reviewing as within the scope of the COA whether the movant’s § 2255 motion was procedurally barred when the district court had not addressed the issue). Moreover, it is well established that we may affirm the district court on any ground supported by the record, regardless of the ground stated in the district court’s order or judgment. *Castillo v. United States*, 816 F.3d 1300, 1303 (11th Cir. 2016). A legal claim or argument that is not plainly and prominently raised in an initial appellate brief is ordinarily deemed abandoned. *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680-81 (11th Cir. 2014). However, *pro se* pleadings are held to less stringent standards than those drafted by lawyers and liberally construed. *Leal v. Ga. Dep’t of Corr.*, 254 F.3d 1276, 1280 (11th Cir. 2001).

There is a one-year statute of limitations for filing a § 2255 motion, which begins to run following the date on which the judgment of conviction becomes final or 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. 28 U.S.C. §2255(f)(1), (3). Moreover, “a judgment of conviction becomes final when the time expires for

filing a petition for certiorari contesting the appellate court’s affirmation of the conviction.” *Clay v. United States*, 537 U.S. 522, 525 (2003).

The ACCA, which imposes heightened prison sentences for certain defendants with three prior convictions for either violent felonies or serious drug offenses, defines the term “violent felony” as any crime punishable by a term of imprisonment exceeding one year 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)(1), (2)(B). The first prong of this definition is referred to as the “elements” clause, while the second prong contains the “enumerated crimes” clause and what is commonly called the “residual” clause. *United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012).

Two recent Supreme Court cases inform our analysis in this case. In *Johnson*, the Supreme Court held that the residual clause was unconstitutionally vague. 135 S. Ct. at 2557-58, 2563. In *Descamps*, the Supreme Court discussed two different approaches for determining whether a particular conviction qualifies as an ACCA predicate depending on the statutory scheme. 570 U.S. at 257. If a statute contains a single, indivisible set of elements, courts must use the categorical approach, which looks only to the elements of the offense to determine the

qualification of a prior conviction. *Id.* at 258. However, if the statute contains alternative sets of elements, such that it is divisible, courts may use the modified categorical approach. *Id.* at 257. That approach allows for a limited inquiry using certain sources for determining under what set of elements the defendant had been previously convicted. *Id.* at 257, 263.

In *Beeman v. United States*, we 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. 871 F.3d 1215, 1219-20 (11th Cir. 2017), *cert. denied*, 139 S. Ct. 1168 (2019). To distinguish between the two, we 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 elements or enumerated offenses clause.” *Id.* at 1220. We held that a federal prisoner had raised a timely *Johnson* claim because he had argued that his offense “historically qualified as an ACCA predicate under the ACCA’s residual clause,” we had “been using the residual clause as a default home for many state statutes that might otherwise have been counted under the elements or enumerated crimes clauses,” and he filed his motion within one year of *Johnson*. *Id.* at 1220-21 (quotation marks and alterations omitted).

Regarding the merits of a *Johnson* claim, we held that “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 1221-22. Further, “if it is just as likely that the sentencing court relied on the elements or enumerated offenses clauses, 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.* at 1222. Conclusory statements lacking support in the record that the district court “must have relied on the residual clause” are not sufficient to meet the movant’s burden. *Id.* at 1224. Similarly, “general observations” that an offense “has historically qualified as an ACCA predicate under the ACCA’s residual clause,” and the residual clause has been used as a “default home for many state statutes that might otherwise have been counted under the elements or enumerated crimes clauses,” do not show that a movant was sentenced as an armed career criminal “solely because of the residual clause.” *Id.* (quotation marks and alterations omitted).

With respect to what sort of evidence in the record might demonstrate whether a defendant was sentenced under the residual clause, “[e]ach case must be judged on its own facts.” *Id.* at 1224 n.4. Direct evidence in the record could include statements by the district court that the residual clause was relied upon and was the basis for finding the defendant to be an armed career criminal. *Id.*

Circumstantial evidence could include un-objected to statements in the PSI, or statements by the prosecutor, that the elements and enumerated offenses clauses did not apply to the prior conviction. *Id.*

The district court did not err by denying Robinson's § 2255 motion. Although much of Robinson's motion was dedicated to arguments that his prior convictions were not ACCA predicates under the statute's elements and enumerated offenses clauses, it also stated a timely *Johnson* claim. However, Robinson's *Johnson* claim fails because he did not show that he was sentenced as an armed career criminal solely because of the residual clause as required by *Beeman*. Nothing in Robinson's record shows that the district court relied solely on the residual clause. The PSI and sentencing court did not specify under which clause his prior Georgia convictions qualified as ACCA predicates. And Robinson did not, either in the district court or on appeal, point to binding cases holding those convictions could qualify as ACCA predicates only under the residual clause. Thus, even setting aside his two prior drug offenses, Robinson has failed to prove what *Beeman* requires—i.e. that it is more likely than not that it was the use of the residual clause that led to the sentencing court's enhancement of his sentence on the basis of his prior Georgia convictions for aggravated battery and/or robbery by intimidation. Thus, Robinson's *Johnson* claim fails on the merits.

Moreover, Robinson's *Descamps* claim was time-barred. A defendant has one year to file a § 2255 motion from the date on which the judgment of conviction becomes final or 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. *See* 28 U.S.C. §2255(f)(1), (3). Unlike *Johnson*, this Court has held that *Descamps* does not trigger the one-year limitations provision of 28 U.S.C. § 2255(f)(3). *See Beeman*, 871 F.3d at 1219-20. Thus, *Descamps* did not restart the one-year filing deadline following the time period for Robinson to file a writ of *certiorari* after this Court's mandate affirming his conviction in April 2013, which expired long before he filed his motion in June 2016.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.