

Petitioner's Appendices

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-10575-EE

CARLTON ROLAND HUNTER,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: MARTIN, JILL PRYOR and NEWSOM, Circuit Judges.

BY THE COURT:

Carlton Hunter appeals the district court's denial of his motion to vacate sentence brought under 28 U.S.C. § 2255, in which he argued that his life sentence imposed under the federal three-strikes statute, 18 U.S.C. § 3559(c), was unlawful because *Johnson v. United States*, 135 S. Ct. 2551 (2015) (holding the Armed Career Criminal Act's ("ACCA") residual clause unconstitutionally vague), effectively invalidated § 3559(c)'s residual clause. Hunter acknowledged in his § 2255 motion that, at the time of sentencing, the district court did not make a specific finding as to whether Hunter's predicate offenses qualified as "serious violent felonies" under § 3559(c)'s enumerated-offenses, elements, or residual clause. The district court granted Hunter a certificate of appealability ("COA") with the issue "whether Mr. Hunter's

armed robbery and robbery by intimidation convictions qualify under the enumerated crimes clause of § 3559(c)'s serious violent felony definition, set forth in § 3559(c)(2)(F)(i)." On appeal, Hunter argues that his prior convictions for Georgia armed robbery and robbery by intimidation do not fall within § 3559(c)'s enumerated-crimes clause.

The government has moved to vacate the district court's COA, or for summary affirmance, arguing that our recent decision in *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), forecloses Hunter's claim on appeal. Hunter has responded by conceding that *Beeman* is dispositive but requesting that we stay his appellate proceedings, pending the issuance of the mandate in *Beeman*, as the defendant in that case has filed a petition for rehearing *en banc*. He further contends that *Beeman* was wrongly decided.

Summary disposition is appropriate either where time is of the essence, such as "situations where important public policy issues are involved or those where rights delayed are rights denied," or where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, as is more frequently the case, the appeal is frivolous." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

In *Beeman*, the defendant filed a § 2255 motion alleging that his enhanced sentences under the ACCA were unconstitutional because the Georgia crime of aggravated assault was no longer a violent felony after *Johnson*. *Beeman*, 871 F.3d at 1218. *Beeman* conceded that nothing in the record suggested that the court relied only on the residual clause in sentencing him. *Id.* at 1224. We held that a defendant bringing a *Johnson* claim in a § 2255 motion has the burden to "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. And, "[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.* at 1222.

We explained that the inquiry is a historical one and concerns what the record shows about what the sentencing judge relied on at the time of the sentencing. *See id.* at 1224 n.5. We identified a non-exhaustive list of examples of evidence that a defendant could use to try to prove that he was sentenced under the residual clause, such as: (1) comments or findings by the sentencing judge indicating that he or she relied on the residual clause; (2) statements in the presentence investigation report (“PSI”), which were not objected to, recommending that the enumerated and elements clauses did not apply; (3) concessions by the prosecutor that the enumerated and elements clauses did not apply; and (4) clear precedent from the time of sentencing indicating that only the residual clause would authorize a finding that the predicate conviction was a violent felony. *See id.* at 1224 nn.4-5.

We concluded that, because there was nothing in the record suggesting that the district court relied on only the residual clause in sentencing Beeman, and Beeman pointed to no precedent at the time of his sentencing that held or otherwise made obvious that a violation of Georgia’s aggravated assault statute qualified as a violent felony only under the residual clause, Beeman failed to carry his burden, and his *Johnson* claim failed. *Id.* at 1224-25.

Under the prior precedent rule, we are bound by our prior decisions unless and until they are overruled by the Supreme Court or this Court *en banc*. *United States v. Brown*, 342 F.3d 1245, 1246 (11th Cir. 2003). The stay of a mandate in no way affects the duty of a panel of this Court to apply the precedent established by a case in which the mandate was withheld as binding authority. *Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992).

The government's motion for summary affirmance is due to be granted, as our intervening decision in *Beeman* has rendered the government's position clearly right as a matter of law. *See Groendyke*, 406 F.2d at 1162. Hunter concedes that the record in his case is "just as 'silent' as that in *Beeman*" regarding whether the court relied on the residual clause in determining that his predicate convictions were "serious violent felonies." Indeed, like the movant in *Beeman*, who conceded that the record was silent on the matter, Hunter stated in his § 2255 motion that, at the time of sentencing, the district court did not make a specific finding as to whether Hunter's offenses qualified under the enumerated-offenses, elements, or residual clause. *See Beeman*, 871 F.3d at 1224 & nn.4-5. Further, like the movant in *Beeman*, Hunter does not argue that other direct or indirect evidence—such as comments by the sentencing judge, statements in the PSI, concessions by the prosecutor, or clear precedent from the time of sentencing—indicates that only the residual clause was relied upon for concluding that his predicate convictions qualified as "serious violent felonies." *See id.* at 1224 & nn.4-5. Here, as in *Beeman*, because there is nothing in the record suggesting that the district court relied on only the residual clause in sentencing Hunter, and no precedent from the time of Hunter's sentencing made it obvious that the court did so, Hunter has failed to carry his burden, and his *Johnson*-based claim is due to be denied. *See id.* at 1224-25.

As Hunter concedes, *Beeman* has foreclosed his appeal. *See id.* While Hunter argues that *Beeman* was wrongly decided, it remains binding precedent in this Circuit unless and until it is overruled. *See Brown*, 342 F.3d at 1246; *Singletary*, 965 F.2d at 945 n.1. Consequently, there is no substantial question as to the outcome of the case, and the government's position is correct as a matter of law. *See Groendyke*, 406 F.2d at 1162. Accordingly, the government's motion for summary affirmance is GRANTED, its motion to vacate the COA is DENIED as moot, its

motion to stay the briefing schedule is DENIED as moot, and Hunter's motion to stay appellate proceedings is DENIED.

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versus

UNITED STATES OF AMERICA,

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: MARTIN, JILL PRYOR and NEWSOM, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

ORD-42

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,

v.

CARLTON ROLAND HUNTER,

Defendant.

CRIMINAL FILE NO.

1:07-CR-310-1-TWT

ORDER

This is a criminal action. It is before the Court on the Government's Motion to Dismiss [Doc. 152] the Defendant's Motion to Vacate Sentence [Doc. 128]. The Defendant's motion seeks relief under Johnson v. United States, 135 S. Ct. 2551 (2015). He argues that his sentence under the federal three strikes statute, 18 U. S. C. § 3559(c) suffers from the same infirmity as the "residual clause" of the Armed Career Criminal Act at issue in Johnson. However, this argument fails because the Defendant's mandatory life sentence was due to the Defendant having at least two prior serious violent felonies that fell within 18 U. S. C. § 3559(c)(i). Therefore, even if 18 U. S. C. § 3559(c)(ii) is invalid as unconstitutionally vague, the Defendant would have received the same sentence. The Government's Motion to Dismiss [Doc. 152] the Defendant's Motion to Vacate Sentence [Doc. 128] is GRANTED. The

Defendant's Motion to Vacate Sentence [Doc. 128] is DENIED.

SO ORDERED, this 2 day of December, 2016.

/s/Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge