No. _____

In The

Supreme Court of the United States

JOSEPH FENELON COOPER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11093
Non-Argument Calendar

D.C. Docket Nos. 3:17-cv-00178-RV-EMT; 3:97-cr-00068-RV-EMT-1

JOSEPH FENELON COOPER,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(July 12, 2021)

Before LUCK, LAGOA, and BRASHER, Circuit Judges.

PER CURIAM:

APPENDIX A

Joseph Fenelon Cooper appeals the district court's dismissal of his second and successive section 2255 motion. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On March 7, 1997, Cooper, armed with a pistol, entered First Union Bank in Tallahassee, Florida. Cooper banged his pistol on the counter, warned the teller "this isn't a joke, [g]ive me the money," and left the bank with $2,418.

A few weeks later, on March 31, 1997, Cooper and two co-conspirators planned to rob the Premier Bank in Tallahassee after carjacking a taxi. They successfully stole the cab, but when they got to the bank, they noticed that it was busy. They decided to wait for "business to slow down," and began circling the bank in the stolen cab. But their plans were thwarted when a police officer spotted the stolen cab and attempted to pull them over. Cooper and his co-conspirators fled and eventually abandoned the stolen cab, leaving a loaded handgun in the back seat. In the process of fleeing, they also left behind a backpack containing gloves, masks, a hammer, and another handgun. They were eventually caught and arrested. Cooper's co-conspirators admitted that they planned to use the guns during the robbery.

In connection with the attempted robbery of Premier Bank, Cooper was charged with attempting bank robbery, in violation of 18 U.S.C. section 2113(a), and possessing a firearm during a crime of violence, in violation of 18 U.S.C. section

924(c).[1] As to the attempted bank robbery, the indictment charged that Cooper "attempt[ed], by force, violence, and intimidation, to take from the presence of another, United States currency belonging to and in the care, custody, control, management, and possession of the Premier Bank," in violation of 18 U.S.C. section 2113(a). And, as to possessing a firearm during a crime of violence, the indictment charged that the attempted bank robbery was the predicate "crime of violence" under section 924(c). A jury convicted Cooper of both charges.

Cooper moved for a judgment of acquittal. The district court denied the motion, and, as to the possession of a firearm in connection with a crime of violence charge, the district court concluded that it could "construe [it] as applying to an armed bank robbery as being one of those crimes, and an attempted bank robbery to be sufficient, to be a crime of violence." The district court then sentenced Cooper to one hundred sixty months' imprisonment for attempted bank robbery and sixty months' imprisonment for possessing a firearm during a crime of violence. Cooper appealed, and we affirmed. United States v. Cooper, 176 F.3d 492 (11th Cir. 1999).

[1] For his role in the completed robbery of First Union Bank, Cooper was convicted of (1) conspiring to commit bank robbery, (2) armed bank robbery, and (3) possessing a firearm in connection with a crime of violence. Cooper does not challenge these convictions in his section 2255 motion.

In 2000, Cooper filed a section 2255 motion to vacate his convictions. The district court denied his motion, and we denied his request for a certificate of appealability.

Then, in 2016, after the Supreme Court held in Johnson v. United States, 576 U.S. 591 (2015) that the residual clause of the Armed Career Criminal Act was unconstitutionally vague, Cooper sought permission to file a second section 2255 motion. We granted him permission as to his section 924(c) conviction because we could not "definitively say that the attempted-bank-robbery charge against Cooper involved the use, attempted use, or threatened use of physical force against another." So, we directed the district court to consider his claim and determine whether Cooper's motion satisfied the requirements of section 2255(h).

Cooper argued that "under the facts of this case" his attempted bank robbery could only have been a crime of violence under the residual clause because the evidence at his trial "did not establish force or intimidation in any way" as it related to the attempted bank robbery. Cooper also argued that because his statute of conviction, 18 U.S.C. section 2113(a), contained two ways to commit attempted bank robbery, one of which did not require proof of force or intimidation, it could not be considered a crime of violence except under the residual clause.[2] And,

[2] Under section 2113(a), there are two ways to commit attempted bank robbery.

because the government did not show force or intimidation, Cooper argued, he could only have been convicted under paragraph two of section 2113(a), which did not include force, violence, or intimidation as an element.

The district court dismissed Cooper's second section 2255 motion because he failed to satisfy the requirements of section 2255(h). The district court explained that Cooper had to show that it was "more likely than not that the residual clause, and only the residual clause, was the basis for the conviction." The district judge—who was the judge that sentenced Cooper—found that he relied exclusively on the elements clause of section 924(c)(3). The district court also found that our decisions after Cooper's conviction confirmed that attempted bank robbery "qualifie[d] as an elements clause crime of violence." The district court explained that bank robbery was a crime of violence under section 924(c)(3)'s elements clause, see In re Sams,

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> [(1)] Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
>
> [(2)] Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny
>
> Shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 2113(a).

830 F.3d 1234, 1239 (11th Cir. 2016) (per curiam), and that "attempted crimes of violence may also categorically qualify [as crimes of violence] under [section] 924(c)(3)(A)."

We granted a certificate of appealability to determine:

> Whether the district court erred in finding that Cooper failed to satisfy his burden under Beeman v. United States, 871 F.3d 1215 (11th Cir. 2017), to show that he was unconstitutionally sentenced under the residual clause of 18 U.S.C. [section] 924(c), when he was convicted of attempted armed bank robbery.

STANDARD OF REVIEW

When reviewing a district court's dismissal of a section 2255 motion, we review the district court's factual findings for clear error and legal determinations de novo. United States v. Pickett, 916 F.3d 960, 964 (11th Cir. 2019).

DISCUSSION

Section 924(c) of the Armed Career Criminal Act makes it a separate crime, punishable by a five-year minimum sentence consecutive to any other sentence, to use or carry a firearm "during and in relation to," or possess a firearm "in furtherance of," any "crime of violence." 18 U.S.C. § 924(c). The Act defines a "crime of violence" as a felony offense that: (A) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another"; or (B) "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Id.

§ 924(c)(3)(A)–(B). The first part of the definition is known as the elements clause, and the second part is known as the residual clause. Granda v. United States, 990 F.3d 1272, 1284 (11th Cir. 2021). In United States v. Davis, 139 S. Ct. 2319 (2019), the Supreme Court held that section 924(c)(3)'s residual clause was unconstitutionally vague.

Cooper argues that the district court erred by dismissing his section 2255 motion because he met his burden "to show that his [section] 924(c) conviction resulted from application of solely the residual clause." See In re Hammoud, 931 F.3d 1032, 1041 (11th Cir. 2019) (per curiam) (explaining that the section 2255 movant "bear[s] the burden of showing he is actually entitled to relief on his Davis claim, meaning he will have to show that his [section] 924(c) conviction resulted from application of solely the residual clause"). Cooper contends that, because the government did not establish force or intimidation in connection with his attempted bank robbery, his conviction must have been under the second paragraph of section 2113(a), which could only have been a crime of violence under section 924(c)(3)'s residual clause. We disagree.

In Granda, we held that collateral relief for a Davis claim is subject to harmless error review. 990 F.3d at 1292. The harmless error standard provides that "relief is proper only if we have grave doubt" about whether an error, including improperly relying on section 924(c)(3)'s invalid residual clause, had a "substantial

and injurious effect or influence in determining the . . . verdict." Id. (quoting Davis v. Ayala, 576 U.S. 257, 267–68 (2015)). Put another way, we may only grant relief "if the error 'resulted in actual prejudice.'" Id. (quoting Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)). To show actual prejudice, we must "ask directly whether the error substantially influenced" the court's decision. Id. (internal quotation marks omitted). It is not enough that the court could have relied on the now-invalid residual clause; we can only grant relief if Cooper can show that the court did rely on the residual clause. Id. at 1288. Here, we have no "grave doubt" about whether Cooper was convicted and sentenced based solely on the residual clause because the district court's findings, the indictment, and the jury instructions show that the district court relied on the elements clause.

First, the district court found that it relied solely on the elements clause of section 924(c)(3) to determine that attempted bank robbery was a crime of violence. "The district court obviously is in a better position than we are to evaluate what likely happened [at sentencing]," especially since this is the same judge who initially sentenced Cooper. See Pickett, 916 F.3d at 967. And Cooper has not shown that the district court's conclusion—that it relied solely on section 924(c)(3)'s elements clause—was clearly erroneous because he has not identified any evidence in the trial or sentencing record contradicting the district court's conclusion. See id. at 964 (reviewing a district court's factual findings for clear error).

Second, the indictment supports the conclusion that the district court relied on the elements clause because the indictment based the section 924(c) charge on attempted bank robbery under the first paragraph of section 2113(a). The indictment charged that Cooper "attempt[ed], by force, violence, and intimidation, to take from the presence of another, United States currency belonging to and in the care, custody, control, management, and possession of the Premier Bank" in violation of 18 U.S.C. section 2113(a). This charge mirrors almost exactly the first paragraph of section 2113(a). See 18 U.S.C. § 2113(a) ("Whoever, by force and violence, or by intimidation, . . . attempts to take, from the person or presence of another, . . . money . . . in the care, custody, control, management, or possession of, any bank"). And, attempted bank robbery under the first paragraph of section 2113(a) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." See id. § 924(c)(3)(A).

Moreover, "a bank robbery conviction under [section] 2113(a) by force and violence or by intimidation qualifies as a crime of violence" under the elements clause of section 924(c). In re Sams, 830 F.3d at 1239. And, when a substantive offense qualifies as a crime of violence under the elements clause, an attempt to commit that offense is itself a crime of violence "given [section] 924(c)'s 'statutory specification that an element of attempted force operates the same as an element of completed force, and the rule that conviction of attempt requires proof of intent to

commit all elements of the completed crime.'" United States v. St. Hubert, 909 F.3d 335, 352 (11th Cir. 2018) (citation omitted), abrogated on other grounds by Davis, 139 S. Ct. 2319. So, even where a defendant's actions in attempting bank robbery "fall[] short of actual or threatened force, the robber has attempted to use actual or threatened force because he has attempted to commit a crime that would be violent if completed." Id. at 353 (discussing attempted Hobbs Act robbery).[3]

Third, like the indictment, the jury instructions reinforce the conclusion that the district court relied on the elements clause in determining that Cooper's attempted bank robbery conviction was a crime of violence. Here, "there is no uncertainty about whether the jury in [Cooper's] case relied on a predicate offense that is a violent crime." See In re Price, 964 F.3d 1045, 1048 (11th Cir. 2020). The jury instructions told the jury that it only could convict Cooper of possessing a firearm in connection with a crime of violence if it found him guilty of attempted bank robbery. The instructions also explained that:

> [Cooper] can be found guilty of [attempted bank robbery] only if all of the following facts are proved beyond a reasonable doubt:
>
> First: That [Cooper] knowingly attempted to take from the person or the presence of the person described in the indictment, money or

[3] Cooper argues that St. Hubert was wrongly decided and should be overturned. But "we are bound by all prior panel decisions, 'unless and until they are overruled or undermined to the point of abrogation by the Supreme Court or by this Court sitting en banc.'" Hylor v. United States, 896 F.3d 1219, 1226 (11th Cir. 2018) (alteration adopted) (quoting United States v. Deshazior, 882 F.3d 1352, 1355 (11th Cir. 2018)).

> property then in the possession of a federally insured bank as charged; and
>
> Second: That [Cooper] intended to do so by means of force or violence or by means of intimidation.

(emphasis added). The jury instructions continued: "To take 'by means of intimidation' is to say or do something in such a way that a person of ordinary sensibilities would be fearful of bodily harm. . . . The essence of the offense is the taking of money or property aided and accompanied by intentionally intimidating behavior on the part of [Cooper]." The jury instructions did not say Cooper could be convicted for merely attempting to enter the bank (i.e., committing attempted bank robbery under the second paragraph of the attempted bank robbery statute); rather, they required the jury to find that Cooper attempted to take money from the bank "by means of force or violence or by means of intimidation." Thus, the jury instructions show that when the district court looked to them to determine if Cooper's attempted bank robbery conviction was a crime of violence, it considered the first paragraph of the attempted bank robbery statute, see 18 U.S.C. § 2113(a), which "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," see 18 U.S.C. § 924(c)(3)(A).

Because the indictment and jury instructions show that Cooper was convicted and sentenced under the first paragraph of the attempted bank robbery statute, and Cooper has not pointed to any evidence showing that the district court clearly erred

by concluding that it relied solely on the elements clause, Cooper cannot show that the district court relied on section 924(c)(3)'s residual clause. In sum, this record does not show a "substantial likelihood" that the district court did not rely in whole or in part on the elements clause when sentencing Cooper. See Granda, 990 F.3d at 1288.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA

vs. Case Nos.: 3:97cr68/RV/EMT
3:17cv178/RV/EMT

JOSEPH FENELON COOPER

ORDER[1]

Defendant Joseph Fenelon Cooper has filed a "Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody." (ECF No. 262.) The Government filed a response (ECF No. 268), and Cooper filed a reply and three Notices of Supplemental Information and Authority. (ECF Nos. 270, 272, 274.) After a review of the record and the arguments presented, as well as case law that has developed since the parties' submissions, I have determined that Cooper's motion is an unauthorized successive motion and should be dismissed.

PROCEDURAL BACKGROUND

Cooper was charged in seven counts of a nine-count indictment with various offenses relating to bank robbery and possession of a firearm. (ECF No. 1.) He

[1] The assigned magistrate judge entered a report and recommendation on July 16, 2019, which was vacated due to the Eleventh Circuit's July 23, 2019, opinion in *In re Hammoud*, 931 F. 3d 1032 (11th Cir. 2019).

was convicted after a jury trial of conspiracy to commit bank robberies (Count 1), attempted bank robbery (Count 8), and possession of a firearm during and in relation to a crime of violence, under 18 U.S.C. § 924(c) (Count 9), and he was acquitted on two counts. (ECF No. 45.) A separate trial on Counts 6 and 7 of the indictment (armed bank robbery and possession of a firearm during and in relation to a crime of violence, respectively) resulted in a guilty verdict on both counts. (ECF No. 76.) I sentenced Cooper to a total term of imprisonment of 460 months. (ECF No. 96.)[2] The Eleventh Circuit affirmed his convictions and sentence. (ECF No. 131.)[3]

Cooper filed a § 2255 motion in June of 2000 challenging only his convictions on Counts 6 and 7. (ECF No. 176.) I denied the motion (ECF Nos. 192–194), and the Eleventh Circuit denied Cooper's request for a certificate of appealability. (ECF No. 214.)

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[2] The total 460-month term of imprisonment consisted of: 60 months on Count 1 and 160 months on Counts 6 and 8 with all terms to run concurrently; 60 months on Count 9 to run consecutively to Counts 1, 6, and 8; and 240 months on Count 7 to run consecutively to all other counts. (ECF No. 96.)

[3] On appeal, Cooper argued the district court erred in (1) severing the trial on Counts 6 and 7; (2) admitting unduly prejudicial evidence that he knew his co-conspirators because he supplied them with drugs; (3) denying his motion for judgement of acquittal and his motion to vacate his convictions on Counts 8 and 9; (4) admitting "other crimes" evidence at his second trial; and (5) including damages from acquitted charges in the restitution calculation. (ECF No. 131.)

Nearly five years later, on July 27, 2016, the Eleventh Circuit granted Cooper's application for an order authorizing consideration of a second or successive motion to vacate. (ECF No. 263.)[4] Cooper argued in the application that his convictions for conspiracy to commit bank robberies (Count 1), armed robbery (Count 6), and attempted armed bank robbery (Count 8) no longer qualify as crimes of violence under § 924(c) after *Johnson v. United States*, 135 S. Ct. 2551 (2015), and thus his conviction on Count 9, the 924(c) count," was "void." (*Id*. at 2.) The appellate court found Cooper's claims as to Counts 1 and 6 to be meritless, but it allowed Cooper to proceed on his challenge to the use of his attempted robbery conviction in Count 8 as a predicate to support his § 924(c) conviction in Count 9.[5]

Count 8 of the indictment charged that Cooper and two others attempted to rob a bank on March 31, 1997. As summarized by the Eleventh Circuit in its order

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[4] Section § 2255(h) provides:

A second or successive motion must be certified, as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) Newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) A new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h).

[5] The Eleventh Circuit determined that Count 1 was not a predicate offense for a 924(c) conviction, so whether conspiracy was a crime of violence was irrelevant, and Count 6 was a proper predicate because robbery was a crime of violence under the use of force clause of § 924(c).

granting Cooper's application for leave to file a second or successive § 2255 motion, Cooper and his co-conspirators drove to Tallahassee, stole a taxi cab, and drove it to the target bank where they observed a large pickup truck in the bank's parking lot. (*See* ECF No. 263 at 5.) They speculated that the truck might belong to a large man inside the bank, and they circled the bank in the stolen taxi instead of going inside. In the meantime, the taxi driver had reported his vehicle stolen. Law enforcement apprehended the men two to three blocks from the bank and learned of the planned robbery only when one of the co-conspirators spontaneously confessed. (*Id.*)

Based on these facts, the Eleventh Circuit could not definitively find that the attempted bank robbery involved the "use, attempted use, or threatened use of physical force against another" under § 924(c)(3)(A). (ECF No. 263 at 7.) The court noted that the substantive crime of armed bank robbery was a crime of violence under § 924(c), post-*Johnson*, but it had not yet addressed "whether attempted bank robbery categorically qualifies as a crime of violence under § 924(c)." (*Id.*). Because the classification of attempted bank robbery as a crime of violence under the "use of force" clause in § 924(c)(3)(A) was uncertain, the Eleventh Circuit concluded it could not decide whether Cooper's sentence on Count 8 could provide

the basis for the § 924(c) sentence on Count 9 if *Johnson* made the § 924(c)(3)(B) residual clause unconstitutional. The appellate court thus found Cooper had made a *prima facie* showing that he had met the statutory criteria of § 2255(h). It reiterated that no deference is owed to this finding and I therefore need to determine independently whether Cooper met the requirements of § 2255(h). (*Id*. at 8 (citing *Jordan v. Secretary, Dept. of Corr.*, 485 F. 3d 1351, 1357 (11th Cir. 2007)(citing 28 U.S.C. § 2244(b)(4)); *In re Moss*, 703 F. 3d 1301, 1301 (11th Cir. 2013).)

In accordance with the Eleventh Circuit's order, Cooper filed the instant § 2255 motion in March of 2017 challenging the use of his attempted bank robbery conviction in Count 8 as a predicate for the § 924(c) conviction in Count 9. (ECF No. 262 at 4.) He focuses on the facts underlying the attempted robbery conviction to support his conclusion that it "could not be a crime of violence under the unconstitutional residual clause" and that his conviction on Count 9 must therefore be vacated. (ECF No. 262-1 at 9.)

The Government asserts Cooper's motion should be dismissed because he has not made the requisite *prima facie* showing that he is entitled to relief as required by § 2255(h), because *Johnson* is inapplicable to § 924(c). (ECF No. 268 at 1, 10-11, 16.)

The legal landscape has changed significantly since Cooper filed his motion in July of 2017. *Johnson* can no longer be considered controlling. After review of the file and the evolution of the law, it is clear that Cooper's motion must be dismissed as an unauthorized successive motion.

DISCUSSION

There is a three-step process for a litigant to obtain relief based on a second or successive § 2255 motion in the Eleventh Circuit. *See Perez v. United States*, 730 F. App'x 804, 809 (11th Cir. 2018). First, the Eleventh Circuit must make a prima facie determination that § 2255(h)'s requirements are met, as it did in this case in July of 2016. (ECF No. 263.) Next, it is incumbent upon the district court to independently determine, based on a more developed record, that the movant has satisfied the requirements for filing a second or successive motion. *See* § 2255(h). As part of this inquiry, the court must determine whether there is a jurisdictional or procedural bar to the motion. *In re Hammoud*, 931 F. 3d 1032, 1039-40 (11th Cir. 2019) (citing *In re Baptiste*, 828 F. 3d 1337 (11th Cir. 2016) (holding that a jurisdictional bar exists for claims that were raised and rejected in a prior successive application)). Only after that may the district court reach the third step and evaluate the merits of the motion. *In re Moss*, 703 F. 3d 1301, 1303 (11th Cir. 2013).

Thus, "the movant must get through two gates—[the Eleventh Circuit's] and the district court's—before the merits of the motion can be considered." *Perez*, 730 F. App'x at 809 (citation omitted).

In accordance with this precedent, before considering the merits of Cooper's motion, I must assess whether the motion meets one of the two prongs of § 2255(h). (ECF No. 263 at 8.) In this case, Cooper relies on § 2255(h)(2), "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2). Cooper's challenge to his § 924(c) conviction was originally premised upon on the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which the Supreme Court held to be retroactively applicable on collateral review. *See Welch v. United States*, 136 S. Ct. 1257 (2016). *Johnson*, of course, only invalidated the residual clause of the ACCA, although it spawned significant litigation from defendants seeking to expand its scope to other "residual clauses." *See, e.g., Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (striking the residual clause of the definition of "crime of violence" contained in 18 U.S.C. § 16(b)).

In June of 2019, the Supreme Court held, in a challenge raised on direct review, that the definition of "crime of violence" contained in § 924(c)(3)(B) is

unconstitutionally vague. *United States v. Davis*, 139 S. Ct. 2319 (2019). The *Davis* Court did not decide the issue of retroactivity. *See, id.* at 2354, (Kavanaugh, J., dissenting ("who knows whether the ruling will be retroactive?")).

"[T]he Supreme Court is the only entity that can 'ma[k]e' a new rule retroactive." *Tyler v.* Cain, 533 U.S. 656, 663 (2001) (discussing 28 U.S.C. § 2244(b)(2)(A), which contains identical language to section 2255(h)(2). When the Court does so, it does so unequivocally, in the form of a holding," rather than through dictum or multiple holdings, "unless those holdings necessarily dictate retroactivity of the new rule." *In re* Anderson, 396 F. 3d 1336, 1339 (11th Cir. 2005). The Eleventh Circuit has held, for purposes of § 2255(h)(2), that the Supreme Court's holdings in *Davis* and *Welch*, taken together, dictate the retroactivity of *Davis*, and therefore it is retroactively applicable on collateral review. *In re Hammoud*, 931 F. 3d 1032, 1039 (11th Cir. 2019). Thus, a *Davis* claim meets the preliminary requirements of § 2255(h). The inquiry does not end there, however, because the moving party must prove that his claim is predicated upon the new rule.

For a litigant to proceed on a claim involving an invalidated residual clause, he must show that it was more likely than not that the residual clause, and only the residual clause, was the basis for his conviction. *See Beeman v. United States*, 871

F. 3d 1215, 1222 (11th Cir. 2017); *Hammoud*, 931 F. 3d at 1041. The moving defendant does not meet his burden by showing it is merely "possible" that the court relied on the residual clause. *Beeman,* 871 F. 3d at 1222; *see also In re Moore*, 830 F. 3d 1268, 1270-1271 (11th Cir. 2016) (holding that to proceed with a second or successive § 2255 motion based on *Johnson,* a prisoner must do more than identify *Johnson* as the basis for his claim; rather he must show he falls within the scope of the new substantive rule announced in *Johnson*); *In re Pollard*, 931 F. 3d 1318, 1320 (11th Cir. 2019) (denying application to file a second or successive § 2255 motion based on *Davis* because bank robbery "qualifies as a 'crime of violence' under § 924(c)(3)(A)'s use of force clause"). In the face of a silent record, this can be a difficult, or even insurmountable, burden, but it remains the defendant's burden nonetheless. *Beeman*, 871 F.3d at 1223-24. If "the evidence does not clearly explain what happened . . . the party with the burden loses. *Id.* at 1225 (*quoting Romine v. Head*, 253 F. 3d 1349, 1357 (11th Cir. 2001)); *Carmichael v. United States*, 758 F. App'x 860 (11th Cir. 2019) (quoting *Beeman*).

Beeman was not decided until September of 2017, after briefing was complete. Thus, Cooper does not address the requirements of *Beeman* in his motion. Rather, he relies on the underlying facts of the offense conduct to argue

that, in this case, the Government did not establish force or intimidation, and therefore his conduct cannot be considered a crime of violence except under the unconstitutional residual clause. (*See* ECF No. 262-1 at 8; ECF No. 274 at 2.)

Cooper cannot meet his burden under *Beeman.* I relied exclusively on the elements clause of § 924(c)(3) to find that the underlying offense of attempted bank robbery was a crime of violence. The PSR reflects that the trial evidence established that Cooper and a co-defendant each intended to carry a weapon during the robbery. Two weapons were found: a .357 revolver and a .32 pistol. Therefore, there was no need to rely, either in whole or in part, on the now-unconstitutional residual clause.

Subsequent case law supports my conclusion. The Eleventh Circuit has recently reiterated that federal bank robbery "categorically qualifies as an elements clause crime of violence." *Gibson v. United States,* 760 F. App'x 703, 704-705 (11th Cir. 2019) (citing *In re Sams*, 830 F. 3d 1234, 1239 (11th Cir. 2016)). The appellate court has not yet directly weighed in on whether attempted bank robbery is a crime of violence under the elements cause. However, at least one federal appellate court has so held. *See United States v. Armour,* 840 F. 3d 904, 907 (7th Cir. 2017) (holding that federal attempted bank robbery is a crime of violence under

the elements clause); *but see United States v. Jones*, 418 F. 3d 726, 729 (7th Cir. 2005) (stating "attempted bank robbery qualifies as a 'crime of violence.'" citing both 18 U.S.C. §§924(c)(3)(A)-(B) and 2113(a)). The Eleventh Circuit has held that "attempted crimes of violence may also categorically qualify under § 924(c)(3)(A)." *Ovalles v. United States*, 905 F. 3d 1300, 1305 (11th Cir. 2018)[6] (citing *United States v. McGuire*, 706 F. 3d 1333, 1335 (11th Cir. 2018)). The definition of crime of violence in the elements clause of § 924(c)(3)(A) "includes offenses that have as an element the 'attempted use' or 'threatened use' of physical force." *United States v. St. Hubert*, 909 F. 3d 335, 351 (11th Cir. 2018).[7] The *St. Hubert* court rejected the defendant's claim that the substantial step in an attempt crime "must always involve the actual or threatened use of force for an attempt to commit a violent crime to qualify under § 924(c)(3)(A)'s elements clause." *Id.* at 353; *see also Hill v. United States*, 877 F. 3d 717, 718-19 (7th Cir. 2017) ("When a substantive offense would be a violent felony under § 924(e) and similar statutes, an attempt to commit that offense is also a violent felony.") *cert. denied*, 139 S. Ct. 352 (2018). Finally, although not dispositive, another court in this district has expressly

[6] *Ovalles* was abrogated on other grounds by *United States v. Davis*, 139 S. Ct. 2319 (2019).
[7] *St. Hubert* was abrogated on other grounds by *United States v. Davis*, 139 S. Ct. 2319 (2019).

held that attempted bank robbery is a crime of violence within the meaning of the elements clause. *See United States v. Barry Cooper*, Cases 4:99cr37/RH/CAS; 4:16cv458/RH/CAS, 2019 WL 3948098, *2 (N.D. Fla. Aug. 20, 2019) (relying on cases holding that the substantive offense of bank robbery was a crime of violence under the elements clause, not just under the residual clause).

Conclusion

In sum, Cooper has not established that his challenge to the use of his attempted bank robbery conviction as a predicate for his § 924(c) conviction relies on the "new rule of constitutional law" originally pronounced in *Johnson* and ultimately enunciated in *Davis*.[8] Because his claim is not based on the new rule, his motion does not meet the requirements of 28 U.S.C. § 2255(h), and it must be dismissed as an unauthorized second or successive motion. *See* 28 U.S.C. § 2255(h)(2); § 2244(b)(4); *Jordan*, 485 F. 3d at 1358; *Moss*, 703 F. 3d at 1303.

[8] The Supreme Court's decision in *Davis* did not undermine the elements clause of § 924(c), and therefore *Davis* did not restart the statute of limitations, or re-open the door, for defendants to bring challenges under that clause. *See In re Hires*, 825 F. 3d 1297, 1303 (11th Cir. 2016) (defendants typically are precluded from using a timely residual clause claim "as a portal to relitigate whether [a predicate offense] qualifies under the elements clause"); *Levert v. United States,* 766 Fed. App'x, 932, 935-36 (11th Cir. 2019) (distinguishing claims arising under the residual clause from those arising under the elements clause). Thus, even if Cooper sought to raise an elements clause claim, because it was neither raised on appeal nor raised within one year from the date Cooper's conviction became final, I would find it to be both procedurally barred and untimely.

Certificate of Appealability

Rule 11(a) of the Rules Governing Section 2255 Proceedings provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." A timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rule 11(b), Rules Governing Section 2255 Cases.

After review of the record, I find no substantial showing of the denial of a constitutional right. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (explaining how to satisfy this showing) (citation omitted). No additional argument is necessary to this determination, and a certificate of appealability will be denied.

Accordingly, it is **ORDERED:**

1. Cooper's Motion to Vacate, Set Aside, or Correct Sentence (ECF No. 262) is **DISMISSED as successive**.

2. A certificate of appealability is **DENIED**.

DONE AND ORDERED this 21st day of January 2020.

/s/ *Roger Vinson*

ROGER VINSON
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11093-AA

JOSEPH FENELON COOPER,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

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

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

BEFORE: LUCK, LAGOA, and BRASHER, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11093-A

JOSEPH FENELON COOPER,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Joseph Cooper moves for a certificate of appealability ("COA") in order to appeal the district court's determination that his 28 U.S.C. § 2255 motion failed to satisfy § 2255(h)(2). To merit a COA, he must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Here, Cooper has satisfied the *Slack* test, and as such, his motion for a COA is GRANTED, on the following issue:

> Whether the district court erred in finding that Cooper failed to satisfy his burden under *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), to show that he was unconstitutionally sentenced under the residual clause of 18 U.S.C. § 924(c), when he was convicted of attempted armed bank robbery

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

THE UNITED STATES OF AMERICA,

Plaintiff,

vs. Case No. 3:97cr68-RV

JOSEPH FENELON COOPER,

Defendant.
_____/

TRANSCRIPT OF FIRST DAY OF FIRST TRIAL

The above-entitled matter came on to be heard before the Honorable ROGER VINSON, Chief United States District Judge, in the United States Courthouse, Pensacola, Florida, on the 11th day of September, 1997, commencing at 9:04 a.m.

APPEARANCES:

For the Government: NANCY J. HESS
Assistant United States Attorney
114 East Gregory Street
Pensacola, FL 32501

For the Defendant: CLYDE M. TAYLOR, JR.
Attorney at Law
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to rob?
A The Premier Bank.
Q How far was the Premier Bank from the spot where you apprehended Mr. Forgione and Mr. Cooper?
A Not too far.
Q What did Mr. Forgione tell you about the bank robbery in Pensacola? Did he give you some details about those robberies?
A He told me that they committed the bank robberies, and at one point the doors were locked and he had a shotgun to blow a hole through the glass to get out and exit. He told me that upon exiting that he dropped a bunch of the money.
Q And so at that time he was talking to you about other bank robberies, is that right?
A Yes.

MS. HESS: I have no other questions of this witness.

THE COURT: Any cross?

MR. TAYLOR: Yes, sir.

CROSS-EXAMINATION

BY MR. TAYLOR:
Q Officer Lewis, all three of the defendants were at the sheriff's department at the time you testified concerning the statements of Mr. Cooper, is that correct?
A Yes.
Q And -- and the procedure had been to try to separate each

enforcement folks?
A Yes.
Q Do you know who he had been talking to?
A The FBI and the robbery task force.
Q And the FBI would be Agent Chester?
A Yes.
Q And the robbery task force would be one or more officers of either TPD, that is the Tallahassee Police Department, or the Leon County Sheriff's Department, is that correct?
A Yes.
MR. TAYLOR: If I might have one moment, Judge?
THE COURT: Yes.
BY MR. TAYLOR:
Q Incidentally, when the statement by Mr. Forgione about robbing banks for fun and his girlfriend getting turned on and he had $12,000 and he shooting the door out of the bank, was anybody else present with you when he made that statement?
A No.
MR. TAYLOR: Thank you.
That's all I've got.
THE COURT: Redirect?
REDIRECT EXAMINATION
BY MS. HESS:
Q When were you talking to Mr. Forgione, did he tell you what the plan was that day?

A Yes.
Q What did he tell you the plan was?
A The plan was they would steal the cab, go to Premier Bank, he told me at the time at the Premier Bank there was too many people in there, so he decided not to hit the bank at that time, drove around a little more, drove back to Premier Bank, still had too many people in it, and at that time they decided to go back to the car and that's when they were spotted by the sheriff.
Q Did he tell you their plan was to do anything that day but to rob the bank?
A No.
MS. HESS: I have no other questions.
THE COURT: Officer Lewis, you may step down now, step outside. You are excused.
THE WITNESS: Thank you.
THE COURT: Next witness?
MS. HESS: Adrienne Pearson.
(Pause)
ADRIENNE PEARSON, GOVERNMENT WITNESS, SWORN
THE CLERK: Please have a seat. State your name and spell your last name for the record.
THE WITNESS: My name is Adrienne Pearson, P-E-A-R-S-O-N.
THE CLERK: Thank you.

Q Did they stay with you, or did they leave?
A They left. What happened, we had made a meeting place. Once I got a car, I was supposed to go back off Mack's Drive where they were gonna leave the Mitsubishi 3000GT which is the car that we went to Tallahassee in, they were gonna leave it there, I was gonna pick it up and we were gonna go straight to the bank from there. Okay? Well, after I sat in the Wal-Mart parking lot for about an hour, hour and a half, I just couldn't walk up to someone, hold a gun to them and steal their car. They came back, Chris and Joe, they came back, picked me up. We drove to the store, got a drink, bag of chips, and while we were driving, both Joe and Chris were explaining to me that, you know, a taxicab would be the easiest to get, you know, we will drop you off here, you call a taxicab, get him to come pick you up, you take the taxicab to this point they had specified, they took me to this certain place, and said you drop the taxicab driver off here, and you go back over here where we are gonna be waiting, and it was the same place we were gonna be waiting for the stolen car from Wal-Mart.

And so what happened is we drove down Capital Circle Road, got to a little gas station, a Texaco, and I called a cab, and the cab came, I took him to the place I was supposed to take him, you know, he got out, I drove over and picked Joe and Chris up.

Q So you dropped the taxicab driver off at the place they had told you?
A Yeah. It was Northwest taxi was the name of the place where I was supposed to drop him off. Where it was was a back road, I guess, they were getting ready to start construction of the neighborhood and they hadn't yet started. I drove him back there, it was just nothing but woods, and I dropped him off, and I went picked Joseph and Chris up at this specified place.
Q When you got to this specified place, how were Mr. Cooper and Mr. Forgione dressed?
A They were in sweatshirts, jeans, just ready to go. They jumped into the car. We circled around the bank one time just to get a look at it. The second time around they already had the latex gloves on, Halloween masks on, and they were ready to go in. Okay? Second time we went around there was a big Silverado truck in the front of the bank, in the front of the bank, and both Chris and Joe, we don't want to deal with some big hillbilly, you know, we don't want to -- we don't want to have to fight, you know. And so they said go around one more time. What happened is, when went back again, the truck was still there. We were gonna go back around again, by the time we went in the circle, a sheriff's deputy had spotted the car.
Q Now, you indicated at one point while you were circling or getting ready to go to the bank, Mr. Cooper and Mr. Forgione

had put their masks and their gloves on, is that right?
A Yes, ma'am.
Q Where was the backpack that had contained those items?
A It was in the backseat with both Joseph and Chris.
Q Where were the guns?
A Chris had the .357 and Joseph had the .32.
Q You indicated that you circled the banks once, you circled the bank a second time?
A Uh-huh.
Q What happened after the second time?
A By this time, you know, I'm saying this car is hot, we need to get out of this car, you know, we will go around one more time, but before I could go around one more time there is a sheriff's deputy right there. Okay? He did a U-turn and pulled up behind me. And I went through a parking lot, went across the street back to another parking lot and stopped the car we all three jumped out and ran into the woods.
Q Did Mr. Cooper and Mr. Forgione continue to have the masks on the whole time they were in the taxi?
A No, ma'am.
Q When did they take them off?
A Okay. Once we made that second pass around the bank and they realized that they didn't want to go in because the truck was still there, they took them off, because we are driving and there is traffic all around, you know, we didn't need to

be seen as a bunch of people with masks in the car. So right when we passed the bank, they took off, and we just kept going.

Q Was it after that pass that you saw the police officer?

A Yes.

Q Okay. You indicated that you took the taxi to a place where you got out of the vehicle, is that correct?

A (Nodded affirmatively)

A What happened then?

A We ran into the woods, I mean, I didn't know where I was at, we were just running, okay, I mean, I'm just running straight out in the woods. And we ended up at a big culvert just like a big ditch, and we climbed down in there. You know, they took off the sweatshirts, all the evidence, the bag, the backpack and the guns -- actually the .357 got left in the taxicab in the backseat of the car. The .32 was in the book bag. They had thrown everything in there when we started running. We got to the culvert, everything was left in the culvert. And then we got back out and started running towards the direction of the vehicle that we were driving. When we got there Chris poked his head out to see if it was clear to jump the fence and get to the car, and when he did, the officer was standing at the end of the street and saw them. And Chris and Joe took off running, and I sat there. When the officer jumped the fence he arrested me, and then a couple

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

THE UNITED STATES OF AMERICA,

Plaintiff,

vs. Case No. 3:97cr68-RV

JOSEPH FENELON COOPER,

Defendant.
_____/

TRANSCRIPT OF SECOND DAY OF FIRST TRIAL

The above-entitled matter came on to be heard before the Honorable ROGER VINSON, Chief United States District Judge, in the United States Courthouse, Pensacola, Florida, on the 12th day of September, 1997.

APPEARANCES:

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point the two individuals in the back seat, Mr. Forgione and Mr. Cooper took the masks off for the third pass.

Unfortunately for the defendants in the car, a police officer came along before they could get back to the bank, spotted these individuals, pulled the car over and it was at that time that they jumped out of the cab, left one gun behind, took one gun with them and escaped into the woods.

The government has charged the defendant with attempted bank robbery because of that attempted robbery at the Premier Bank. So let me tell you what the elements of an attempted bank robbery are in order for you to make your determination as to whether the facts that you are aware of have proven beyond a reasonable doubt that the defendant was involved.

The defendant can be found guilty of this offense only if all of the following facts are proved beyond a reasonable doubt:

That the defendant knowingly attempted to take from the person or presence of the person described in the indictment money or property then in possession of the federally insured bank as charged. You are advised that the Premier Bank is a federally insured institution.

The second thing that the government must prove is that the defendant intended to do so by means of force or violence or by means of intimidation.