

No. _____

IN THE
Supreme Court of the United States

LUIS FERNANDEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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MAY 15TH, 2025

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114 F.4th 1170
United States Court of Appeals, Eleventh Circuit.

Luis FERNANDEZ, Petitioner-Appellant,

v.

UNITED STATES of America,
Respondent-Appellee.

No. 21-12915

|
Filed: 08/13/2024

Synopsis

Background: After his convictions of conspiracy to commit Hobbs Act robbery, attempt to commit Hobbs Act robbery, and possession of a firearm in furtherance of a crime of violence were affirmed on direct appeal, [661 F.3d 568](#), and his first motion to vacate, set aside, or correct sentence was denied, [2018 WL 10447093](#), defendant filed second or successive motion to vacate, set aside, or correct sentence. The United States District Court for the Southern District of Florida, No. 1:20-cv-23034-CMA, [Cecilia M. Altonaga](#), J., adopted report of magistrate judge and denied relief. Defendant appealed.

Holdings: The Court of Appeals, [Rosenbaum](#), Circuit Judge, held that:

district court had jurisdiction over defendant's prosecution for possession of a firearm in furtherance of a crime of violence;

statutory arguments were irrelevant in determining whether it was more likely than not that it was use of the residual clause that led to defendant's sentencing enhancement; and

defendant failed to show that, as a matter of historical fact, it was more likely than not that his conviction of possession of a firearm in furtherance of a crime of violence resulted from application of the unconstitutional residual clause.

Affirmed.

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

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Recognized as Unconstitutional

[18 U.S.C.A. §§ 16, 924\(c\)\(3\)\(B\)](#)

***1172** Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:20-cv-23034-CMA

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Before [Rosenbaum](#), [Newsom](#), and [Luck](#), Circuit Judges.

Opinion

[Rosenbaum](#), Circuit Judge:

Federal law imposes criminal liability—and a five-year mandatory prison sentence consecutive to any other sentence—for possession of a firearm in furtherance of a crime of violence. *See* [18 U.S.C. § 924\(c\)](#). To be validly convicted under [§ 924\(c\)](#), a defendant must, as relevant here, commit a “crime of violence.”

Petitioner-Appellant Luis Fernandez seeks relief from his [§ 924\(c\)](#) conviction on the ground that he did not commit a valid predicate “crime of violence.” If Fernandez were convicted under [§ 924\(c\)](#) based on the same predicate “crime[s] of violence”—conspiracy to commit and attempted Hobbs Act robbery—today, he would be correct. But our precedent effectively requires Fernandez to prove that his [§ 924\(c\)](#) conviction rested solely on [§ 924\(c\)](#)'s residual clause, whether by pointing to record evidence or contemporaneous precedent from when the conviction was entered. He can't carry that burden. So after careful consideration, and with the benefit of oral argument, we must affirm the district court's denial of habeas relief.

I. BACKGROUND

A. Criminal Prosecution

In August 2007, Fernandez and several others conspired to rob a (fictional) cocaine stash house. Police had enlisted a confidential informant and undercover officer to assist with the scenario. The co-conspirators waited for a call from a person they believed was a drug courier transporting twenty to thirty kilograms of cocaine to a stash house. In fact, though, an undercover officer was playing the part of that drug courier whose call they awaited. Once the conspirators received that call, they (including Fernandez) left for the (fictional) stash house and put firearms they intended to use during the robbery in the informant's car. When the officers arrested the conspirators on the way to their destination, they found a black duffel bag containing five loaded firearms.

A grand jury indicted Fernandez, along with several co-defendants, on charges of conspiracy to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(ii), and 846 (Count 3); attempt to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(ii), and 846, and 18 U.S.C. § 2 (Count 4); conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count 5); attempt to commit Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951(a) and 2 (Count 6); and *1173 carrying and possessing a firearm in furtherance of a crime of violence and a drug-trafficking crime, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2 (Count 7). The indictment¹ premised the § 924(c) charge in Count 7 on the charges in Counts 3 through 6.

After the close of the evidence, the district court instructed the jury that, to convict Fernandez of the § 924(c) offense, it had to find that he “committed a drug trafficking offense or crime of violence charged in Counts [3, 4, 5, or 6] of the Superseding Indictment.” The jury found Fernandez guilty of the § 924(c) count. But the general verdict form it returned did not specify the predicate offense or other findings supporting the § 924(c) conviction. Rather, the form simply declared Fernandez guilty of Counts 5 (Hobbs Act conspiracy), 6 (Hobbs Act attempt), and 7 (§ 924(c) charge) and not guilty of Counts 3 and 4.

The district court sentenced Fernandez to a total term of 360 months' incarceration: 60 months on Counts 5 and 6, and 300 months on Count 7, to run consecutively.

Fernandez filed an unsuccessful direct appeal. *United States v. Perez*, 661 F.3d 568, 587 (11th Cir. 2011) (consolidated appeal with co-defendants). In that appeal, Fernandez challenged the sufficiency of the evidence and raised a Sixth Amendment compulsory-process claim but did not challenge his § 924(c) predicates. *Id.* at 573, 579.

B. Postconviction Proceedings

In 2016, Fernandez moved to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. In that motion, Fernandez challenged his § 924(c) conviction based on *Johnson v. United States*, 576 U.S. 591, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). He claimed that his conviction could have rested on § 924(c)'s residual clause, which he argued was unconstitutionally void for vagueness.² But *Johnson*, the case on which he relied, invalidated the residual clause of the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e), not § 924(c). So the district court concluded that *Johnson* did not “newly recognize[]” the “right asserted” in Fernandez's petition, and Fernandez could not use that case to overcome the one-year filing bar for § 2255 motions.³ It therefore denied Fernandez's motion as untimely, or alternatively, as procedurally defaulted. We denied a certificate of appealability (“COA”).

In June 2020, Fernandez sought authorization to file a second or successive § 2255 motion. He wanted to challenge his § 924(c) conviction as unconstitutional and void under *United States v. Davis*, 588 U.S. 445, 139 S.Ct. 2319, 204 L.Ed.2d 757 (2019). As we've noted, *Davis* invalidated § 924(c)'s residual clause, *id.* at 470, 139 S.Ct. 2319, and Fernandez claimed that his § 924(c) conviction could have rested on that void clause. We granted Fernandez's motion. We acknowledged that under our then-recent decision in *Brown v. United States*, 942 F.3d 1069 (11th Cir. 2019), *1174 “conspiracy to commit Hobbs Act robbery ... does not qualify as a crime of violence under § 924(c)(3)'s elements clause.” And we noted that the indictment “referenced multiple, distinct predicate offenses and the jury returned a general guilty verdict,” so we couldn't be sure whether the predicate offense that the jury found warranted the § 924(c) conviction qualified as a crime of violence. Given those circumstances, we said, Fernandez “made a *prima facie* showing that his ... § 924(c) conviction may be unconstitutional under *Davis*, as he potentially was sentenced under the now-invalid residual clause of § 924(c)(3).”

Fernandez filed a second or successive § 2255 motion,

contending that his § 924(c) conviction was unconstitutional because it may have been supported by a void predicate offense (conspiracy to commit Hobbs Act robbery). On June 29, 2021, the district court denied Fernandez’s motion, finding that the conspiracy offense was inextricably intertwined with the attempt offense, which it believed to be a valid predicate.⁴

Fernandez moved for reconsideration after the Supreme Court granted certiorari in *United States v. Taylor*, — U.S. —, 141 S. Ct. 2882, 210 L.Ed.2d 990 (2021). As we detail below, *Taylor* presented the question of whether attempted Hobbs Act robbery is a valid predicate “crime of violence” under § 924(c)’s elements clause. The district court granted Fernandez’s motion and issued a COA on the following question: “whether the Court erred in determining that attempted Hobbs Act robbery is a valid section 924(c) predicate.” Fernandez timely appealed.

We stayed Fernandez’s appeal pending the Supreme Court’s decision in *United States v. Taylor*, 596 U.S. 845, 142 S.Ct. 2015, 213 L.Ed.2d 349 (2022). We now consider Fernandez’s appeal with the benefit of that decision.

II. STANDARDS OF REVIEW

In an appeal from a denial of a § 2255 motion, we review questions of law de novo and factual findings for clear error. *Steiner v. United States*, 940 F.3d 1282, 1288 (11th Cir. 2019). We review issues of jurisdiction de novo. *United States v. Iguaran*, 821 F.3d 1335, 1336 (11th Cir. 2016).

III. DISCUSSION

Before we address Fernandez’s claims on appeal, we summarize the relevant legal background.

Under 18 U.S.C. § 924(c)(1)(A), “any person who, during and in relation to any crime of violence or drug trafficking crime ... uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime ... be sentenced to a term of imprisonment of not less than 5 years.”

The statute defines “crime of violence” as follows:

an offense that is a felony and –

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may *1175 be used in the course of committing the offense.

18 U.S.C. § 924(c)(3). In *Davis*, the Supreme Court held subsection (B), the “residual clause,” to be unconstitutionally void for vagueness.⁵ 588 U.S. at 470, 139 S.Ct. 2319. In doing so, the Court explained that broad application of the residual clause “would result in the vast majority of federal felonies becoming potential predicates for § 924(c) charges, contrary to the limitation Congress deliberately imposed when it restricted the statute’s application to crimes of violence.” *Id.* at 462, 139 S.Ct. 2319. To qualify as a crime of violence, then, an offense must meet the definition in the “elements clause,” 18 U.S.C. § 924(c)(3)(A).

Here, for purposes of our analysis, we assume without deciding that Fernandez’s predicate was a “crime of violence”—namely, either conspiracy to commit Hobbs Act robbery or attempted Hobbs Act robbery.⁶ But precedent holds that neither of those crimes qualifies as a “crime of violence” under the elements clause.

First, in *Brown v. United States*, 942 F.3d 1069, 1075 (11th Cir. 2019) (per curiam), we held that conspiracy to commit Hobbs Act robbery is not a “crime of violence” under the elements clause. We articulated the three elements of a Hobbs Act conspiracy conviction: “(1) two or more people, including the defendant, agreed to commit Hobbs Act robbery; (2) the defendant *1176 knew of the conspiratorial goal; and (3) the defendant voluntarily participated in furthering that goal.” *Id.* (citing *United States v. Ransfer*, 749 F.3d 914, 930 (11th Cir. 2014)). And we found that none of these elements “necessitates the existence of a threat or attempt to use force,” including “because a defendant’s voluntary participation may manifest itself in any one of countless non-violent ways.” *Id.*

Then, in *Taylor*, the Supreme Court held that attempted Hobbs Act robbery is also not a “crime of violence” under the elements clause. 596 U.S. at 852, 142 S.Ct. 2015. The Court reasoned that a conviction for attempted Hobbs Act robbery requires proof of two elements: “(1) [t]he defendant intended to unlawfully take or obtain personal property by means of actual or threatened force, and (2) he completed a ‘substantial step’ toward that end.” *Id.* at

851, 142 S.Ct. 2015 (citing *United States v. Resendiz-Ponce*, 549 U.S. 102, 107, 127 S.Ct. 782, 166 L.Ed.2d 591 (2007)). An intention alone does not satisfy the elements clause. *Id.* And a substantial step “does not require the government to prove that the defendant used, attempted to use, or even threatened to use force[.]” *Id.* So attempted Hobbs Act robbery cannot qualify as a predicate “crime of violence” under § 924(c)’s elements clause. See *id.* at 852, 142 S.Ct. 2015.

Taken together, *Davis* forecloses Fernandez’s § 924(c) crime-of-violence predicates from qualifying under the residual clause, and *Brown* and *Taylor* foreclose those predicates, respectively, from qualifying under the elements clause. But as we explain below, our precedent imposes an additional hurdle that Fernandez cannot clear: the framework we first articulated in *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017).

Our discussion proceeds in two parts. First, we address Fernandez’s jurisdictional arguments and conclude that the district court did not lack jurisdiction over Fernandez’s § 924(c) prosecution. Second, we explain that Fernandez cannot meet his burden under *Beeman* of proving that his § 924(c) conviction relied solely on the residual clause, so we must affirm the district court’s denial of his petition.

A. The district court did not lack jurisdiction over Fernandez’s § 924(c) prosecution.

As a threshold matter, Fernandez argues that the district court lacked jurisdiction over his § 924(c) prosecution because the charged conduct did not and could not constitute a crime. We disagree and hold that the district court in this case did not lack jurisdiction.

An indictment that “charges the defendant with violating a valid federal statute as enacted in the United States Code” is sufficient to invoke the district court’s subject-matter jurisdiction under 18 U.S.C. § 3231. *United States v. Brown*, 752 F.3d 1344, 1354 (11th Cir. 2014). But “when the indictment itself fails to charge a crime, the district court lacks jurisdiction.” *United States v. Moore*, 954 F.3d 1322, 1334 (11th Cir. 2020). And a jurisdictional defect “strips the court of its power to act and makes its judgment void.” *McCoy v. United States*, 266 F.3d 1245, 1249 (11th Cir. 2001) (cleaned up).

To support his jurisdictional argument, Fernandez relies principally on our decision in *United States v. St. Hubert*, 909 F.3d 335, 351 (11th Cir. 2018). There, we

(incorrectly) held that attempted Hobbs Act robbery was a valid § 924(c) predicate. *Id.* During our discussion, we said that a defendant’s “challenge to his § 924(c) convictions on [the] ground” that they “failed to charge an offense against the laws of the United States” is jurisdictional and cannot be waived by the defendant’s guilty plea. *Id.* at 344. In turn, we cited *1177 *United States v. Peter*, 310 F.3d 709, 714 (11th Cir. 2002), in which the defendant’s Racketeer Influenced and Corrupt Organizations (“RICO”) Act “indictment consisted only of specific conduct that, as a matter of law, was outside the sweep of the charging statute.” In other words, the indictment charged an invalid predicate, and we held that error to be jurisdictional. See *id.*⁷

Of course, *Taylor* abrogated our core holding in *St. Hubert*. But Fernandez argues that *Taylor* did not abrogate our finding that the viability of the predicate there was a jurisdictional matter. We assume without deciding that Fernandez is correct and accept for the sake of argument that an indictment that fails to charge any valid § 924(c) predicate would not confer jurisdiction over the § 924(c) offense.

But that doesn’t help Fernandez. To be sure, Fernandez was not *convicted* of any valid § 924(c) predicates. But the indictment still *charged* him with other valid predicates: conspiracy to possess with intent to distribute cocaine and attempt to possess with intent to distribute cocaine. See *Parker v. United States*, 993 F.3d 1257, 1262–63 (11th Cir. 2021). And the district court’s jurisdiction did not evaporate upon Fernandez’s acquittal of the drug-related charges. If it did, courts would lack jurisdiction over any prosecution in which a jury acquitted the defendant of the charges. That, of course, is not the case.

Fernandez also invokes the Supreme Court’s pronouncement that “Congress has not authorized courts to convict and sentence [defendants] to a decade of further imprisonment under § 924(c)(3)(A)” based on the predicate offense of attempted Hobbs Act robbery. *Taylor*, 596 U.S. at 852, 142 S.Ct. 2015. But again, that Congress “has not authorized” a § 924(c) *conviction* based on attempted Hobbs Act robbery does not mean that Congress has deprived the federal courts of *jurisdiction* to adjudicate § 924(c) charges based at least in part on other valid predicates. So we reject Fernandez’s jurisdictional arguments.

B. Fernandez has not met his burden of proving that his § 924(c) conviction rested solely on the residual clause.

We now consider whether Fernandez’s § 924(c) conviction rested solely on the residual clause.

Our analysis proceeds in three parts. First, we briefly review the legal and procedural posture of Fernandez’s claim. Second, we explain that the *Beeman* framework governs Fernandez’s challenge to his § 924(c) conviction. And third, we apply the *Beeman* framework to Fernandez’s *Davis* claim and find that Fernandez has failed to meet his burden.

1. Fernandez’s motion is before us on a Davis claim.

We begin with a review of the legal and procedural posture of Fernandez’s petition. As relevant here, § 2255(h)(2) requires that “[a] second or successive motion must be certified ... by a panel of the appropriate court of appeals to contain ... 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). In *1178 contrast, § 2255(h) does not authorize circuit courts to certify a claim relying on a new rule of statutory law. *In re Griffin*, 823 F.3d 1350, 1356 (11th Cir. 2016). So as relevant here, only claims that contain a new rule of constitutional law satisfy § 2255’s gatekeeping requirements.

Under § 2255(h)(2), a three-judge panel of this Court certified that Fernandez’s § 2255 motion made a preliminary showing that he met § 2255(h)’s jurisdictional requirements. Specifically, the panel certified that Fernandez’s motion implicated *Davis*’s new constitutional rule because Fernandez “made a *prima facie* showing that ... he potentially was sentenced under the now-invalid residual clause of § 924(c)(3).”

In contrast, Fernandez’s *Taylor* and *Brown* arguments are statutory—not constitutional. So they could not serve as a basis for Fernandez’s second or successive motion to pass through § 2255(h)(2)’s gateway and on to merits consideration.⁸ That’s important because, as we explain later, it means that Fernandez’s *Taylor* and *Brown* claims are “irrelevant” under the *Beeman* framework when we analyze Fernandez’s *Davis* claim. See *Santos v. United States*, 982 F.3d 1303, 1310 (11th Cir. 2020).

2. Beeman’s framework governs challenges to § 924(c) convictions.

We turn next to the legal framework that governs the merits of Fernandez’s second or successive § 2255 motion. In *Beeman*, we held that a § 2255 petitioner bears 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.” 871 F.3d at 1222.⁹ There, the petitioner challenged his sentencing enhancement under the ACCA, which imposes a fifteen-year mandatory minimum when a defendant “has three previous convictions ... for a violent felony or a serious drug offense.” See 18 U.S.C. § 924(e). *Beeman* argued that his prior Georgia aggravated-assault conviction was not a “violent felony,” so it could not support an ACCA enhancement. See *Beeman*, 871 F.3d at 1218. But we denied § 2255 relief because it was “unclear from the record whether the sentencing court had relied on the residual clause or the elements clause, or both” in enhancing *Beeman*’s sentence. *Id.* at 1224–25.

In doing so, we held that a § 2255 petitioner is not entitled to relief “[i]f it is just as likely that the sentencing court relied on the elements ... clause, solely or as an alternative basis for the enhancement.” *Id.* at 1222. In other words, a petitioner cannot succeed if all he can show is that the district court *could* have relied on the residual clause. See *id.* Rather, the petitioner must show that the district court relied on the residual clause either as a matter of “historical fact,” through evidence in the sentencing record, or by reference to “clear” law “at the time of sentencing.” *Id.* at 1224 nn.4–5. We said that this burden-of-proof framework “reflects longstanding and fundamental interests in finality.” *Id.* at 1223.

We have repeatedly applied *Beeman* to *Johnson* challenges to ACCA enhancements. See, e.g., *1179 *United States v. Pickett*, 916 F.3d 960, 963–64 (11th Cir. 2019); *Tribue v. United States*, 929 F.3d 1326, 1331 (11th Cir. 2019); *Weeks v. United States*, 930 F.3d 1263, 1271–72 (11th Cir. 2019); *Santos*, 982 F.3d at 1310 (characterizing *Beeman* as a “threshold burden” in a § 2255 challenge based on both the residual and elements clauses); *Williams v. United States*, 985 F.3d 813, 816 (11th Cir. 2021); *Pitts v. United States*, 4 F.4th 1109, 1114–15 (11th Cir. 2021). So at least in the ACCA context, our precedent is clear: the district court must have relied “solely on the residual clause” for a petitioner to obtain § 2255 relief. See *Beeman*, 871 F.3d at 1221.

But Fernandez asserts that *Beeman* doesn’t apply in the § 924(c) context because material differences exist between the ACCA and § 924(c). He notes the ACCA is a sentencing enhancement, while § 924(c) is a substantive criminal offense. To that end, he points out that the ACCA contemplates a “backward-looking question,”

McNeill v. United States, 563 U.S. 816, 820, 131 S.Ct. 2218, 180 L.Ed.2d 35 (2011), requiring courts to determine whether a defendant “has three *previous* convictions ... for a violent felony or a serious drug offense,” 18 U.S.C. § 924(c)(1) (emphasis added). So it follows, Fernandez contends, that *Beeman* is also backward-looking and concerned with “historical fact” at the time of sentencing. See *Beeman*, 871 F.3d at 1224 n.5.

Fernandez further asserts that, by contrast, § 924(c) is a substantive criminal offense that requires a contemporaneous determination of whether the defendant used or possessed a firearm “during and in relation to any crime of violence or drug trafficking crime” or “in furtherance of” such a crime. 18 U.S.C. § 924(c)(1)(A). He suggests that present-tense language does not, by its plain terms, require an inquiry into “historical fact.” See *Beeman*, 871 F.3d at 1224 n.5.

But whatever the merits of Fernandez’s arguments, our precedent forecloses them. Applying *Beeman*, we have held that a § 2255 petitioner “bear[s] the burden of showing that he is actually entitled to relief on his *Davis* claim, meaning he will have to show that his § 924(c) conviction resulted from application of solely the residual clause.” *In re Hammoud*, 931 F.3d 1032, 1041 (11th Cir. 2019) (first citing *In re Moore*, 830 F.3d 1268, 1271–73 (11th Cir. 2016); and then citing *Beeman*, 871 F.3d at 1222–25). True, *Hammoud* was only an authorization to file a second or successive § 2255 petition, so it did not further articulate or apply *Beeman*’s framework. But it is binding, just the same. See *St. Hubert*, 909 F.3d at 346.¹⁰ And in any event, *Hammoud* is not our only § 924(c) case to cite *Beeman*.

Indeed, we have since reiterated *Beeman*’s application in the § 924(c) context. See *Alvarado-Linares v. United States*, 44 F.4th 1334, 1341 (11th Cir. 2022) (first quoting *Hammoud*, 931 F.3d at 1041; and then citing *Beeman*, 871 F.3d at 1222–25). In *Alvarado-Linares*, we noted that a § 2255 petitioner may satisfy his *Beeman* burden through “record evidence” or “‘by reference to legal principles alone’—that is, parsing the state of the law to determine whether the residual clause affected the *conviction* or sentence.” *Id.* (quoting *Williams*, 985 F.3d at 816) (emphasis added). To be sure, we did not actually apply *1180 *Beeman* in *Alvarado-Linares*, because “the parties d[id] not distinguish between the state of the law at the time of the conviction and the state of the law today.” *Id.*; cf. also *Granda v. United States*, 990 F.3d 1272, 1280–83 (11th Cir. 2021) (citing but not applying *Beeman* because petitioner procedurally defaulted his *Davis* challenge to his § 924(o) conviction). And Alvarado-Linares’s claim failed under either “state of the law,” so we did not have

to consider *Beeman*’s treatment of post-sentencing case law. See *Alvarado-Linares*, 44 F.4th at 1341. But it is clear that we have, on repeated occasions, said that the *Beeman* framework applies when we consider § 2255 petitions involving § 924(c) convictions.

As a panel, we cannot retract that extension. Rather, we are bound by our prior panel precedent “unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*.” *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). So we must apply *Beeman* to Fernandez’s claims.

3. Fernandez cannot show that his conviction relied on § 924(c)’s residual clause, so he is not entitled to relief.

As we’ve mentioned, under *Beeman*’s framework, Fernandez must “show that his § 924(c) conviction resulted from application of solely the residual clause.” *Hammoud*, 931 F.3d at 1041 (first citing *Moore*, 830 F.3d at 1271–73; and then citing *Beeman*, 871 F.3d at 1222–25). He has two paths to carrying this burden. First, he may make the requisite showing through “a ‘finding of historical fact’—in other words, there may be record evidence that the [residual] clause did or did not lead to a conviction or sentence.” *Alvarado-Linares*, 44 F.4th at 1341 (quoting *Williams*, 985 F.3d at 816); see also *Beeman*, 871 F.3d at 1224 n.4. Second, and alternatively, he may “resolve[]” the matter “‘by reference to legal principles alone.’” *Id.* (quoting *Williams*, 985 F.3d at 816).

But here, Fernandez can’t follow either of these paths to the finish line. First, the record of conviction does not indicate that Fernandez’s § 924(c) conviction—with respect to either the Hobbs Act conspiracy or attempt predicate—relied on the residual clause. Rather, the jury returned only a general guilty verdict, and the jury was instructed only that it must find “that the defendant committed a drug trafficking offense or crime of violence charged in Counts [3, 4, 5, or 6] of the Superseding Indictment.” As for the judgment, it reads only that Fernandez was convicted under 18 U.S.C. § 924(c)(1)(A) for “Carrying a Firearm During a Drug Trafficking Crime/Crime of Violence.” So the record does not prove that Fernandez’s § 924(c) conviction rested on the residual clause.

Fernandez’s second path fares no better. He first asks us to confront *Brown* and *Taylor*. *Brown* and *Taylor* held that conspiracy and attempt to commit Hobbs Act robbery, respectively, are not “crimes of violence” under

§ 924(c)'s elements clause. *Brown*, 942 F.3d at 1075; *Taylor*, 596 U.S. at 852, 142 S.Ct. 2015. Fernandez argues that those decisions did not limit their holdings to convictions after 2019 or 2022, respectively, so convictions for conspiracy and attempt to commit Hobbs Act robbery could *never* be crimes of violence as a matter of categorical statutory analysis.

We agree. “A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.” *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–13, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994). In other words, *Brown* and *Taylor* stand for the propositions, respectively, that Hobbs Act conspiracy and attempt were not “crimes *1181 of violence” under the elements clause at *any* point—not when Fernandez was convicted in 2009, and not now. That makes sense, because the judiciary’s role is “to say what a statute means,” *Rivers*, 511 U.S. at 312, 114 S.Ct. 1510, which is necessarily what the statute has always meant.

But Fernandez’s *statutory* challenge to his conviction does not satisfy his burden under our precedent. Fernandez’s second or successive § 2255 claim is necessarily a *constitutional* one, *see* 28 § 2255(h)(2): namely, that his § 924(c) conviction is void because it may have relied on the residual clause in violation of *Davis*. Under the strictures of § 2255(h)(2), our precedent holds that Fernandez’s statutory claims are “irrelevant” if he cannot meet his “threshold burden” of showing a constitutional violation. *See Santos*, 982 F.3d at 1309–10. And under *Beeman*, Fernandez can show a *Davis* violation only if, more likely than not, “his § 924(c) conviction resulted from application of solely the residual clause.” *Hammoud*, 931 F.3d at 1041; *see also Beeman*, 871 F.3d at 1222.

In other words, for the purposes of Fernandez’s *Davis* claim—which turns on the *residual* clause—it is “irrelevant” whether his prior convictions are invalid predicates under § 924(c)’s *elements* clause. *See Santos*, 982 F.3d at 1310. Fernandez is entitled to relief only if the sentencing court relied solely on the unconstitutional residual clause, and he must make that showing as *Beeman* directs. That means he must either show that the district court expressly relied solely on the residual clause, or he must cite case law showing “at the time of sentencing that only the residual clause would authorize a finding that the prior conviction was a” crime of violence. *Beeman*, 871 at 1224 n.5. But we’ve said that “a sentencing court’s decision today that” inchoate Hobbs Act offenses “no longer qualif[y] under present law as a violent felony”—or, as extended to § 924(c), a “crime of

violence”—“under the elements clause ... casts very little light, if any, on [that] key question of historical fact.” *Id.*

We must return, then, to the state of our case law in 2009, when Fernandez was convicted and sentenced. Fernandez argues that “in 2009, the legal landscape for inchoate crimes conclusively demonstrated that conspiracy and attempt convictions could only have qualified under the residual clause” of § 924(c). That overstates our precedent.

Fernandez relies principally on *United States v. Wilkerson*, 286 F.3d 1324 (11th Cir. 2002) (per curiam), and *United States v. Rainey*, 362 F.3d 733 (11th Cir. 2004) (per curiam). Neither helps him.

First, in *Wilkerson*, the defendant challenged his ACCA enhancement based in part on his prior Florida conviction for conspiracy to commit robbery. 286 F.3d at 1325. We rejected the defendant’s claims, concluding that “[w]hen one reaches an agreement with a co-conspirator to commit a robbery, and formulates the intent to commit the robbery, his conduct presents at least a potential risk of physical injury within the meaning of § 924(e)(2)(B)(ii).” *Id.* at 1325–26. Our holding cited and clearly rested on the ACCA’s residual clause. In other words, *Wilkerson* “established that an [inchoate] crime qualified as a violent felony when its object involved conduct that ‘presented a serious potential risk of physical injury to another’ ” under the residual clause. *United States v. James*, 430 F.3d 1150, 1156 (11th Cir. 2005) (cleaned up) (quoting *Wilkerson*, 286 F.3d at 1326); *cf. also United States v. Cruz*, 805 F.2d 1464, 1474 n.11 (11th Cir. 1986) (reasoning that “any conspiracy to commit a crime of violence” necessarily “create[s] a substantial risk of violence” within the meaning of 18 U.S.C. § 16(b)).

Second, in *Rainey*, the defendant challenged his ACCA enhancement based in part on his prior Florida conviction for *1182 attempted arson. 362 F.3d at 734. Relying on *Wilkerson*, we rejected this challenge, reasoning that “[a]ttempt, like conspiracy, presents the potential risk of physical injury to another.” *Id.* at 736. Again, this holding clearly rested on the ACCA’s residual clause.

But neither of these cases established that a § 924(c) conviction based on Hobbs Act attempt or conspiracy could be valid under *only* the residual clause.¹¹ In other words, case law does not show that, as a matter of “historical fact,” the sentencing court must have relied on the residual clause, only (at most) that it could have. *See Beeman*, 871 F.3d at 1224 n.5; *see also Pickett*, 916 F.3d at 964 (“[A] conviction’s eligibility under one or the other clause cannot be determinative ... because the

conviction’s arguable *qualification* under the elements clause would not necessarily mean the judge *relied* on that clause.” (citation omitted)).

So these cases don’t establish that “the law was clear at the time of sentencing that only the residual clause would authorize” a § 924(c) conviction based on Hobbs Act attempt or conspiracy. See *Beeman*, 871 F.3d at 1224 n.5; cf. also *Williams*, 985 F.3d at 815 (denying § 2255 relief where the “then-existing legal landscape ... was, at best, unclear which clause or clauses the sentencing court would have relied on”); *Santos*, 982 F.3d at 1312 (same, where case law at the time of sentencing was “uninstructive”).

Our historical law on whether Hobbs Act attempt or conspiracy would qualify under the elements clause doesn’t help Fernandez, either. We have reasoned that the “subsequent trajectory of the law” is relevant to the determination of whether a “sentencing judge readily could have believed that [the] conviction qualified under the elements clause.” *Santos*, 982 F.3d at 1313. And nine years after Fernandez was convicted and sentenced, we held that attempted Hobbs Act robbery was a “crime of violence” under the elements clause. *St. Hubert*, 909 F.3d at 346. So the district court could have—wrongly—believed that attempted Hobbs Act robbery was a valid predicate for Fernandez’s § 924(c) conviction under the elements clause. Fernandez has not met his burden under *Beeman* to prove otherwise.

In sum, Fernandez has failed to show that, as a matter of “historical fact,” his § 924(c) conviction resulted from the unconstitutional residual clause, either through “record evidence” or “by reference to legal principles alone.” See *Alvarado-Linares*, 44 F.4th at 1341 (quoting *Williams*, 985 F.3d at 816). Under our precedent, then, he is not entitled to § 2255 relief.

And we cannot sidestep prior panel precedent even if, “were we to decide this issue on a clean slate, we would not so hold.” *In re Dickerson*, 222 F.3d 924, 926 (11th Cir. 2000); see also *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998) (en banc) (we are bound by prior panel precedent even if we are “convinced it is wrong”); *Smith v. GTE Corp.*, 236 F.3d 1292, 1303 (11th Cir. 2001) (prior precedent binds us, even if there are “defect[s] in the prior panel’s reasoning or analysis”). Our precedent requires us to apply *Beeman*, and Fernandez’s inability to meet his burden under that framework requires us to deny his § 2255 petition.

IV. CONCLUSION

For the foregoing reasons, we affirm the district court’s denial of Fernandez’s § 2255 motion.

AFFIRMED.

Rosenbaum, Circuit Judge, concurring:

*1183 Luis Fernandez stands convicted of and will spend twenty-five years in prison for something that Congress did not make a crime. That is so even though Congress enacted a mechanism by which we can correct this error—28 U.S.C. § 2255. We must affirm this result because under our prior-precedent rule, see *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008), we must follow *In re Hammoud*, 931 F.3d 1032, 1041 (11th Cir. 2019), and its progeny, which in turn direct us to apply the framework that *Beeman v. United States*, 871 F.3d 1215, 1222–25 (11th Cir. 2017), establishes. And that framework requires us to deny Fernandez’s habeas petition.

As applied in § 924(c) cases, *Beeman* demands that we set our legal flux capacitors¹ to the moment of the petitioner’s conviction and place ourselves in the legal landscape as it existed then. And if we misunderstood the law at the time of the petitioner’s conviction to authorize that conviction, we must leave that conviction in place. We must do that even if the Supreme Court has since found our understanding of the law to be wrong and has held that the statute of conviction does not now and has not ever covered the petitioner’s conduct.

That’s wrong because *Beeman* itself is wrong. Its rule is unmoored from the text of 28 U.S.C. § 2255, the statute that authorizes us to consider challenges to a prisoner’s conviction. That alone is reason to revisit *Beeman*, *Hammoud*, and their progeny.

Beeman applies § 2255, the statute that authorizes collateral review of federal criminal convictions and sentences. But conspicuously absent from *Beeman* is any analysis of § 2255’s text. In fact, *Beeman* never looked at § 2255’s text. And that’s so even though we must “begin [statutory interpretation], as always, with the text” of the relevant statute. See *United States v. Pielago*, 135 F.3d 703, 712 (11th Cir. 1998). For this reason alone, it’s time to revisit *Beeman*.

When we consult § 2255's text, we must conclude that the *Beeman* framework is wrong. Because Fernandez brings a second or successive petition, I begin my analysis with § 2255(h), which establishes the gates through which a second or successive would-be petitioner may enter federal court. As relevant here, § 2255(h)(2) requires that "[a] second or successive motion must be certified ... by a panel of the appropriate court of appeals to contain—(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).

Most of this requirement refers to terms of art and is straight-forward: "[a] second or successive motion"; "a panel of the appropriate court of appeals"; and "made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." A "second or successive motion" is a term of art that means a prisoner's second or later-in sequence challenge to the same judgment. See *Telcy v. United States*, 20 F.4th 735, 740 (11th Cir. 2021). A "panel of the appropriate court of appeals" is the court of appeals that would review "the order entered on the [original § 2255] motion." 28 U.S.C. § 2255(d). And we've explained that "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," *id.* § 2255(h)(2), is one that "was not dictated by precedent existing at the time the defendant's conviction became final," *1184 *Teague v. Lane*, 489 U.S. 288, 301, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). To apply retroactively, a "new" rule must fit in one of two categories: (1) "new substantive rules"; or (2) "a small set of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Schriro v. Summerlin*, 542 U.S. 348, 351–52, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004) (cleaned up). A new "substantive" rule, in turn, is one that "narrow[s] the scope of a criminal statute by interpreting its terms" or "place[s] particular conduct or persons covered by the statute beyond the State's power to punish." *Id.* (citations omitted).

That leaves "contain." At the time of § 2255(h)'s enactment in 1996, "contain" meant "comprise" or "include." See *Contain*, Merriam-Webster's Collegiate Dictionary (10th ed. 1996); see also *Contain*, Webster's New World College Dictionary (3d ed. 1997) ("to have in it; hold, enclose, or include"). So to satisfy § 2255(h)(2), a movant must show that his motion includes "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

By its terms, then, a § 2255(h)(2) certification is not a

merits determination; rather, it is merely a finding that a petitioner has met the gatekeeping requirements. That is, it's a circuit court's determination that the movant's motion includes a qualifying new rule.

Because a § 2255(h)(2) certification is not a merits determination, we've explained that a movant meets his responsibilities under that section with a *prima facie* showing that his challenged conviction (or sentence) "may—not that it does, but it may—implicate" a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. *Hammoud*, 931 F.3d at 1040. Once we've certified a movant's motion to contain a qualifying new rule, § 2255(h)(2) has served its function, and our gatekeeping role is complete. See *United States v. Peppers*, 899 F.3d 211, 229–30 (3d Cir. 2018).

The movant's second or successive § 2255 motion then goes before the district court for merits consideration under § 2255(b). Subsection (b) provides, in relevant part, that if the district court "finds ... that the sentence imposed was not authorized by law or otherwise open to collateral attack, ... the court shall vacate and set the judgment aside" 28 U.S.C. § 2255(b) (emphasis added).

"[T]he sentence imposed," of course, refers to the sentence that the court imposed that may implicate the new rule. And a court must vacate and set aside the judgment if that sentence is "not authorized by law or otherwise open to collateral attack." *Id.*

So in Fernandez's case, at subsection (h)(2), we determined Fernandez made a *prima facie* showing that his § 924(c) conviction implicated *Davis*'s new rule—that § 924(c)'s residual clause is void for vagueness. See *United States v. Davis*, 588 U.S. 445, 470, 139 S.Ct. 2319, 204 L.Ed.2d 757 (2019). Fernandez therefore passed through § 2255(h)(2)'s gates and into district court for consideration of the merits of his claim.

Then, as I read § 2255, the district court had to conduct a two-step inquiry. First, it had to start with the claim that got Fernandez's § 2255 petition through the gates: his *Davis* claim. That is, it had to consider whether Fernandez's § 924(c) conviction could have been predicated on a crime that qualified under only § 924(c)'s (void-for-vagueness) residual clause at the time of conviction. In other words, the court had to look to the two predicate crimes here—Hobbs Act conspiracy and attempt—and determine whether it could rule out the possibility that they supported Fernandez's *1185 conviction under the residual clause. So for instance, if Fernandez had challenged Hobbs Act conspiracy and

attempt as predicates and the sentencing court had found them to be proper predicates under the elements clause but not the residual clause, the district court could have ruled out the possibility that Fernandez’s conviction implicated *Davis*’s new rule, and Fernandez would have been left without a claim that permitted second or successive collateral review under § 2255. In that case, denial of the motion would be in order.

But without an indication that the predicates couldn’t have relied on the residual clause, § 2255(b) demands further consideration of the motion. At step two, § 2255(b)’s text requires the district court to determine whether, although the sentencing court could have wrongly relied on the residual clause to find the purported predicates qualified, the § 924(c) conviction is nonetheless “authorized by law or otherwise [not] open to collateral attack.” 28 U.S.C. § 2255(b). So here, the district court would ask whether the Hobbs Act attempt and conspiracy predicates could have qualified under the only other available § 924(c) clause—the elements clause.

They couldn’t. *Taylor* held that attempted Hobbs Act robbery doesn’t satisfy the elements clause. *United States v. Taylor*, 596 U.S. 845, 852, 142 S.Ct. 2015, 213 L.Ed.2d 349 (2022). And *Brown* held that conspiracy to commit Hobbs Act robbery doesn’t satisfy the elements clause. *Brown v. United States*, 942 F.3d 1069, 1075 (11th Cir. 2019) (per curiam). Because no other clause exists by which a crime may qualify as a predicate under § 924(c), see Maj. Op. at 1175 n.6, Fernandez’s § 924(c) conviction was “not authorized by law or otherwise open to collateral attack,” and the plain text of § 2255(b) requires that his motion be granted.

Yet instead of this straightforward conclusion, *Beeman* compels the opposite result. *Beeman*’s framework requires courts to travel back in time to determine not that the district court was wrong when it convicted the movant—as we know now, it was—but rather whether the district court was wrong in what *Beeman* says is the right way. That misunderstands fundamental principles of statutory interpretation, as the Supreme Court has articulated them.

The Supreme Court has explained that “[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.” *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–13, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994). That is, the Supreme Court’s interpretation of a statute tells us what the statute has “always meant.” *Id.* at 313, 114 S.Ct. 1510 n.12. Indeed, when the Supreme Court “construes a statute, it is

explaining its understanding of what the statute has meant continuously since the date when it became law.” *Id.*; cf. also *Peppers*, 899 F.3d at 230 (“decisions interpreting the ACCA are not new law at all” but rather “instruct courts on what has always been the proper interpretation of the ACCA’s provisions”).

In other words, the residual and elements clauses have “always meant,” *Rivers*, 511 U.S. at 313 n.12, 114 S.Ct. 1510, what the Supreme Court said they meant in *Davis* and *Taylor*, respectively. The same is true of the elements clause’s meaning as set forth in *Brown*. So Fernandez’s § 924(c) conviction, which is based solely on the predicate crimes of Hobbs Act conspiracy and attempt (which do not qualify as § 924(c) predicates under either the elements or residual clause and have never so qualified), was necessarily void “before as well as after,”² *Davis*, *Taylor*, *1186 and *Brown*, collectively, were issued. And Fernandez’s conviction “was not authorized by law or otherwise open to collateral attack,” 28 U.S.C. § 2255(b), from the moment of conviction. As a result, § 2255(b) requires relief.

But *Beeman* imposes an additional hurdle that is at odds with § 2255’s plain text. Instead of simply requiring Fernandez to show that his conviction or sentence “was not authorized by law,” *id.*, *Beeman* requires him to show that as a matter of “historical fact,” the sentencing court “more likely than not” relied on the residual clause. See *Beeman*, 871 F.3d at 1224 n.5, 1225. It is not enough to show that the law *could not have* authorized his conviction; the petitioner must show that the sentencing court *did not* in fact impose that conviction solely under the residual clause.

But as I’ve noted, the Supreme Court’s interpretation of a statute tells us what the statute has “always meant.” *Rivers*, 511 U.S. at 313 n.12, 114 S.Ct. 1510. So even if *Beeman* silently relied on the word “was” in § 2255(b)’s directive that a court that “finds ... that the sentence imposed was not authorized by law or otherwise open to collateral attack, ... shall vacate and set the judgment aside ...,” (*Beeman* does not include a textual analysis), that cannot justify *Beeman*’s historical inquiry. If it could, then no Supreme Court interpretation of a statute could ever satisfy § 2255(b)’s language. After all, under the type of historical inquiry *Beeman* describes, interpretations that the Supreme Court has since declared are broader than the law permits—including, for instance, pre-*Davis* residual-clause interpretations—were historically thought to be “authorized by law.” But of course, the Supreme Court has taught us that that is not the case: when the Supreme Court “construes a statute, it is explaining its understanding of what the statute has

meant continuously since the date when it became law.” *Rivers*, 511 U.S. at 313 n.12, 114 S.Ct. 1510.

In short, *Beeman* is contrary to what § 2255(b) requires. Generally, “[w]e will not do to the statutory language what Congress did not do with it, because the role of the judicial branch is to apply statutory language, not to rewrite it.” *Harris v. Garner*, 216 F.3d 970, 976 (11th Cir. 2000) (en banc). Yet *Beeman* effectively rewrites § 2255(b), raising the burden on habeas petitioners beyond that imposed by Congress. Indeed, it “penalize[s] a [habeas petitioner] for a court’s discretionary choice not to specify under which clause” it sentenced him. *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017), *abrogated on other grounds by Stokeling v. United States*, 586 U.S. 73, 139 S.Ct. 544, 202 L.Ed.2d 512 (2019).

It does so without textual justification—indeed, without confronting the text of § 2255(b) at all.³ And it does so in contravention of the separation of powers.

***1187** Applying *Beeman* here arrogates power to ourselves to expand § 924(c) beyond what Congress authorized. See THE FEDERALIST No. 47 (James Madison) (“The judges can exercise no ... legislative function ...”). Rather than simply enforcing the law as Congress has written it and as the Supreme Court and we have interpreted it, we are (impossibly) time traveling to save an invalid conviction. Our application of *Beeman* violates the separation of powers, impermissibly expanding § 924(c)’s reach beyond its text. See *Bousley v. United States*, 523 U.S. 614, 620–21, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) (“[U]nder our federal system, it is only Congress, and not the courts, which can make conduct criminal.”).

Not only that, but we’re requiring an incarcerated § 2255 movant to build us the DeLorean.⁴ That is not our role as a coequal branch of government. See *Peppers*, 899 F.3d at 230 (“[A] rule that requires judges to take a research trip back in time and recreate the then-existing state of the law—particularly in an area of law as muddy as this one—creates its own problems in terms of fairness and justiciability.” (citation and internal quotation marks omitted)).

To be sure, the interest in finality cautions against needlessly expanding the scope of habeas review. See, e.g., *Beeman*, 871 F.3d at 1223. But the interest in finality cannot overcome the plain text of § 2255. We must follow the law as Congress has written it.

However strong our interest in finality, “[t]here is little societal interest in permitting the criminal process to rest

at a point where it ought properly never to repose.” *Welch v. United States*, 578 U.S. 120, 131, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016) (alteration in original) (citation and internal quotation marks omitted). And a § 924(c) conviction based on necessarily invalid predicates is one such point.

In sum, *Beeman* requires us to ignore the text of § 2255(b), as well as decisions of the Supreme Court and this Court that inform “what [§ 924(c)] has meant continuously since the date when it became law.” See *Rivers*, 511 U.S. at 313 n.12, 114 S.Ct. 1510. *Beeman* was wrong from the start, and we should correct it.

For the reasons I’ve explained, the *Beeman* framework contravenes the plain text of § 2255(b), undercuts precedent, and threatens the separation of powers. In other words, *Beeman*’s historical-inquiry DeLorean has malfunctioned from the start. It is wrong, then, to continue to insist that we use it. Rather, we must correct past sentences that were not “authorized by law or otherwise open to collateral attack,” 28 U.S.C. § 2255.

So while our prior-panel-precedent rule compels me to concur in the result, I would rehear this case en banc to revisit *Beeman*, *Hammoud*, and their progeny.

Newsom, Circuit Judge, concurring:

I concur in the Court’s judgment and join its opinion in full. I agree that *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), both (1) imposes on a § 2255 movant bringing a *Johnson* claim the burden of demonstrating that his ACCA-based sentence enhancement resulted from the statute’s invalid residual clause and (2) ***1188** requires the § 2255 court to determine whether the movant has made the necessary showing by engaging in what we there called a “historical” inquiry. And I agree that we are bound by decisions like *In re Hammoud*, 931 F.3d 1032 (11th Cir. 2019), and *Alvarado-Linares v. United States*, 44 F.4th 1334 (11th Cir. 2022), which extended *Beeman*’s reasoning from ACCA to § 924(c) cases.

I write separately simply to flag a few pesky issues.

I

First, despite initial misgivings, I'm no longer particularly troubled by *Beeman*'s extension from ACCA to § 924(c) cases. Originally, I was focused on what I perceived to be a relevant distinction between the two statutes—namely, that whereas ACCA refers to “previous convictions,” 18 U.S.C. § 924(e)(1), and thus necessarily asks a “backward-looking question,” *McNeill v. United States*, 563 U.S. 816, 820, 131 S.Ct. 2218, 180 L.Ed.2d 35 (2011), § 924(c) codifies a contemporaneous offense and thus contains no temporal element of the sort that would require a similarly retrospective inquiry. Upon reflection, though, I'm not sure that difference provides a basis for distinguishing ACCA cases from § 924(c) cases vis-à-vis *Beeman*. It now seems to me that what requires the look-back that *Beeman* prescribes—the “historical” investigation—is the fact that a § 2255 proceeding, whether challenging an ACCA enhancement or a § 924(c) conviction, occurs years or even decades after the fact. In either instance, there's simply no way for a § 2255 movant to meet his *Beeman* burden—or for the reviewing court to find that burden met—other than by going “back in time,” so to speak.

II

Second, though, and separately, I do worry that one fragment of an important footnote in *Beeman* might be inconsistent with Supreme Court guidance about the effect of a court's decision regarding the meaning and application of written law. *Beeman*'s footnote 5 says not only (1) that a § 2255 petitioner bringing a *Johnson* (or by extension, a *Davis*) claim must prove a “historical fact”—namely, that he was punished under the applicable statute's invalid residual clause—but also (2) that after-the-fact case law holding that a particular offense doesn't qualify under the applicable statute's still-valid elements clause “casts very little light, if any,” on the required “historical” inquiry. 871 F.3d at 1124 n.5. I share Judge Rosenbaum's concern that the latter observation contradicts the Supreme Court's holding in *Rivers v. Roadway Express, Inc.*—which it grounded in fundamental jurisprudential principles—that “[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction,” *i.e.*, what the statute “has ‘always meant.’ ” Rosenbaum Conc. Op. at

1185-86 (quoting 511 U.S. 298, 312–13 & n.12, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994)); accord, *e.g.*, *Kuhn v. Fairmont Coal. Co.*, 215 U.S. 349, 372, 30 S.Ct. 140, 54 L.Ed. 228 (1910) (Holmes, J., dissenting) (“Judicial decisions have had retrospective operation for near a thousand years.”).

To be sure, *statutory* changes adopted after a movant's judgment of conviction is entered or his sentence imposed should have little bearing on the *Beeman* inquiry. *Cf. Brown v. United States*, 602 U.S. 101, 144 S. Ct. 1195, 1210, 218 L.Ed.2d 583 (2024) (holding that “a state drug conviction counts as an ACCA predicate if it involved a drug on the federal schedules at the time of that offense” regardless of whether the drug remained on those schedules at the time of sentencing). But that rule presumably results, at least in part, from the fact that legislation presumptively *1189 operates prospectively only. Critically, the rule regarding judicial decisions is precisely the opposite. *See, e.g., Rivers*, 511 U.S. at 311–12, 114 S.Ct. 1510 (“The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student.” (citation and internal quotation marks omitted)).

So, for instance, the upshot of the Supreme Court's decision in 2022 that attempted Hobbs Act robbery doesn't constitute a “crime of violence” within the meaning of § 924(c)'s elements clause, *see United States v. Taylor*, 596 U.S. 845, 852, 142 S.Ct. 2015, 213 L.Ed.2d 349 (2022), was that the attempt offense had *never* qualified—including in 2009, when Fernandez was convicted and sentenced. So too, the upshot of this Court's decision in 2019 that conspiracy to commit Hobbs Act robbery isn't a “crime of violence” within the meaning of § 924(c)'s elements clause, *see Brown v. United States*, 942 F.3d 1069, 1075 (11th Cir. 2019), was that the conspiracy offense had *never* qualified—again, including in 2009. So even granting the correctness of *Beeman*'s observation that a *Johnson*- or *Davis*-based § 2255 motion requires the reviewing court to engage in a “historical” inquiry, I think, in a case like this, that what I'll call the “*Rivers* principle” may—and absent *Beeman*'s footnote 5 would—eliminate the possibility that Fernandez's attempt and conspiracy predicates could have been grounded in § 924(c)'s elements clause, leaving only one possibility: that his § 924(c) conviction was predicated on that statute's invalid residual clause.

III

Which leads to a third and final observation. I think we might want to revisit what I take to be an assumption underlying our decision in *Santos v. United States*, 982 F.3d 1303 (11th Cir. 2020). There, a § 2255 movant argued that a particular state-law conviction—battery on a law-enforcement officer—wasn’t a valid ACCA predicate. *See id.* at 1306. To make the necessary *Beeman* showing that his enhancement rested solely on ACCA’s residual clause, the movant contended that the battery offense was not “categorically a crime of violence under [ACCA’s] elements clause”—and therefore, the theory went, his enhancement for that crime must have been predicated on the residual clause. *Id.* at 1307. The *Santos* panel, though, rejected the movant’s argument as “irrelevant.” *Id.* at 1310. By way of explanation, the panel said that “[i]t is not enough to establish that a district court *could have* relied on either the residual clause or another clause; rather, the movant must show that the district court relied *only* on the residual clause.” *Id.*

As I read *Santos*, in concluding that the elements-clause argument was “irrelevant,” our decision effectively precluded § 2255 movants from meeting their *Beeman* burden by what I’d call process of elimination. A § 2255 movant, in other words, can’t demonstrate that a convicting or sentencing court *must* have relied on an invalid residual clause by showing that no other avenue was available to it. Rather, the movant must introduce affirmative evidence that the convicting or sentencing court *in fact* relied on a residual clause. That seems to me to establish too high an evidentiary burden—one not mandated by either the text of § 2255 or *Beeman*. To the extent that I’ve misread *Santos*, I’m happy to be corrected. But if I’ve understood it properly, I would be in favor of reconsidering it and clarifying that a § 2255 movant like Fernandez can meet his *Beeman* burden by eliminating valid elements-clause off-ramps and thereby showing—again, by process of elimination—that he had to have been convicted (or sentenced, as the case may be) under an invalid residual clause.

Luck, Circuit Judge, concurring in the judgment:

*1190 For two reasons, I agree with the majority opinion that Fernandez cannot show that his conviction rested solely on section 924(c)’s residual clause. Fernandez has not met his burden to show the law was clear at the time of sentencing that only the residual clause would authorize a section 924(c) conviction based on Hobbs Act attempt or conspiracy. And he has not met his burden to rule out the possibility that his section 924(c) conviction rested on either of the two drug trafficking predicates (attempt and conspiracy to possess cocaine with the intent to distribute).

Briefly, here are two dicta warnings for district courts and future panels reading the majority opinion. First, footnote six’s double jeopardy discussion is not necessary to the result because the majority opinion assumes—without deciding—that the drug trafficking crimes are not valid predicates. Second, the discussion about the categorical statutory analysis under *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994), is not necessary because, as the majority opinion explains, it is irrelevant whether Fernandez’s prior convictions are invalid predicates under section 924(c)’s elements clause. Even if Fernandez is right about his categorical statutory analysis under *Rivers*, it doesn’t matter because he has not satisfied his burden to show that his section 924(c) conviction rested solely on the residual clause.

All Citations

114 F.4th 1170, 30 Fla. L. Weekly Fed. C 1295

Footnotes

- ¹ The operative charging document was a superseding indictment. For ease of reference, we refer to it as the “indictment.”
- ² We explain § 924(c)’s statutory scheme, including the residual clause, on pages 7–11, *infra*.
- ³ The district court relied on our then-binding decision in *Ovalles v. United States*, 861 F.3d 1257, 1267 (11th Cir. 2017). We vacated *Ovalles*, 889 F.3d 1259 (11th Cir. 2018), and reheard it en banc, holding that

924(c)'s residual clause was *not* void for vagueness, *Ovalles v. United States*, 905 F.3d 1231, 1253 (11th Cir. 2018) (en banc). The Supreme Court held the opposite in *United States v. Davis*, 588 U.S. 445, 470, 139 S.Ct. 2319, 204 L.Ed.2d 757 (2019), abrogating our en banc *Ovalles* decision.

⁴ Alternatively, the district court found that Fernandez's claim was procedurally defaulted. But the government waived the procedural-default issue on appeal, so we do not discuss that issue further. See, e.g., *United States v. Campbell*, 26 F.4th 860, 872 (11th Cir.) (en banc) (holding that courts generally cannot revive waived issues), *cert. denied*, — U.S. —, 143 S. Ct. 95, 214 L.Ed.2d 19 (2022).

⁵ *Davis* followed the Court's previous decisions in *Johnson*, 576 U.S. at 606, 135 S.Ct. 2551, which, as we've noted, held the ACCA's residual clause to be unconstitutionally void for vagueness, and *Sessions v. Dimaya*, 584 U.S. 148, 174–75, 138 S.Ct. 1204, 200 L.Ed.2d 549 (2018), which did the same for 18 U.S.C. § 16.

⁶ For two reasons, we assume without deciding that, on this record, Fernandez's drug-trafficking offenses are not valid predicates. First, it makes no difference to the outcome of this appeal. And second, determining whether Fernandez's drug-trafficking offenses are valid predicates here would require us to decide an issue that the government didn't argue, that the parties didn't brief, and that isn't necessarily clearcut. The jury acquitted Fernandez on both substantive drug-trafficking counts and convicted him on the Hobbs Act conspiracy and attempt offenses. Yet the indictment charged all four of these offenses—the two drug-trafficking offenses and the Hobbs Act conspiracy and attempt offenses—as alternative predicate offenses for a single § 924(c) count. So we have no way of knowing which predicate offense(s) the jury found Fernandez to have carried a gun in connection with. And it certainly could be that the jury convicted Fernandez of the § 924(c) count based solely on one or both Hobbs Act “predicates.” We are, of course, aware that a jury may issue inconsistent verdicts that convict a defendant of a compound offense but acquit the same defendant of a predicate offense. See, e.g., *United States v. Green*, 981 F.3d 945, 960–61 (11th Cir. 2020) (quoting *United States v. Powell*, 469 U.S. 57, 68–69, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984)); *United States v. Hill*, 971 F.2d 1461, 1468–69 (10th Cir. 1992). But in those cases where we've upheld inconsistent verdicts, we had no question that the jury returned an inconsistent verdict. Here, though, the jury returned what appeared at the time to be consistent verdicts: it acquitted Fernandez of the drug-trafficking offenses but convicted Fernandez under § 924(c) and the Hobbs Act predicates. So unlike in the inconsistent-verdict cases, concluding that the jury convicted Fernandez on the § 924(c) count using the drug-trafficking crime(s) as a predicate may risk upholding a conviction that no jury returned. And that would be a problem. Cf. *Erlinger v. United States*, — U.S. —, 144 S. Ct. 1840, 1849–52, 219 L.Ed.2d 451 (2024). Not only that, but to the extent the jury appeared to return consistent verdicts, “the Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by [the] jury's acquittal.” *Yeager v. United States*, 557 U.S. 110, 119, 129 S.Ct. 2360, 174 L.Ed.2d 78 (2009). So we have no way of knowing which predicate offense(s) the jury found Fernandez to have carried a gun in connection with.

⁷ Both *St. Hubert* and *Peter*, as well as the Supreme Court's related decision in *Class v. United States*, 583 U.S. 174, 138 S.Ct. 798, 200 L.Ed.2d 37 (2018), concerned whether the defendants had waived their jurisdictional challenges by pleading guilty. So they do not perfectly map onto the circumstances of this case. That said, without deciding the merits of Fernandez's position, we adopt his broad reading of those decisions for the sake of argument.

⁸ As we've noted, the § 2255(h)(2) gateway does not authorize circuit courts to certify a second or successive motion based on a new rule of statutory law. We also could not certify a § 2255 claim based on *Brown* because we, not the Supreme Court, announced it. See 28 U.S.C. § 2255(h)(2).

⁹ As a reminder, the Supreme Court held the ACCA's residual clause, which has similar language to § 924(c)'s residual clause, to be unconstitutionally void for vagueness in *Johnson*, 576 U.S. at 606, 135 S.Ct. 2551. See *supra* n.5.

¹⁰ As we've noted, *Taylor* abrogated *St. Hubert*'s holding that attempted Hobbs Act robbery qualifies as crime of violence. But it did not affect *St. Hubert*'s rule that "law established in published three-judge orders ... in the context of applications for leave to file second or successive § 2255 motions is binding precedent on *all* subsequent panels of this Court, including those reviewing direct appeals and collateral attacks" 909 F.3d at 346.

¹¹ These cases arose under the ACCA, not § 924(c). And each case concerned state convictions, not Hobbs Act robbery (or inchoate Hobbs Act offenses).

¹ See *Back to the Future* (Universal Pictures 1985).

² *Rivers*, 511 U.S. at 313, 114 S.Ct. 1510.

³ None of our sister circuits who have adopted *Beeman*'s rule appear to have consulted the text of § 2255(b), either. See *Dimott v. United States*, 881 F.3d 232, 243 (1st Cir. 2018); *United States v. Clay*, 921 F.3d 550, 558–59 (5th Cir. 2019); *Potter v. United States*, 887 F.3d 785, 788 (6th Cir. 2018); *Walker v. United States*, 900 F.3d 1012, 1015 (8th Cir. 2018); *United States v. Driscoll*, 892 F.3d 1127, 1135 (10th Cir. 2018); *United States v. West*, 68 F.4th 1335, 1338 (D.C. Cir. 2023). The Third, Fourth, and Ninth Circuits have adopted a more permissive rule, holding that a petitioner meets his burden if his sentence "may have been predicated on application of the now-void residual clause." *Winston*, 850 F.3d at 682 (emphasis added); see also *Peppers*, 899 F.3d at 216; *United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017), *abrogated on other grounds by Stokeling*, 586 U.S. 73, 139 S.Ct. 544, 202 L.Ed.2d 512. The Second and Seventh Circuit have "not yet taken a position on the question." *Waagner v. United States*, 971 F.3d 647, 655 (7th Cir. 2020); see also *Savoca v. United States*, 21 F.4th 225, 234 n.7 (2d Cir. 2021), *vacated in part on reh'g*, No. 20-1502-PR, 2022 WL 17256392 (2d Cir. Nov. 29, 2022).

⁴ To be clear, I do not dispute the general proposition that a § 2255 petitioner bears the burden of proving his entitlement to relief. See *Beeman*, 871 F.3d at 1222. But *Beeman* distorts that burden into an insurmountable wall, without textual justification and with constitutional flaws.

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APPENDIX A-2

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

January 16, 2025

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 21-12915-JJ
Case Style: Luis Fernandez v. USA
District Court Docket No: 1:20-cv-23034-CMA
Secondary Case Number: 1:07-cr-20714-CMA-5

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

REHG-1 Ltr Order Petition Rehearing

In the
United States Court of Appeals
For the Eleventh Circuit

No. 21-12915

LUIS FERNANDEZ,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:20-cv-23034-CMA

2

Order of the Court

21-12915

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

Before ROSENBAUM, NEWSOM, and LUCK, 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 Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. FRAP 35, IOP 2.

APPENDIX A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-23034-CIV-ALTONAGA

LUIS FERNANDEZ,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER

THIS CAUSE came before the Court on Movant, Luis Fernandez’s Motion to Vacate Pursuant to 28 U.S.C. [Section] 2255 [ECF No. 8]. The Government filed an Answer [ECF No. 12]. For the following reasons, the Motion is denied, and a certificate of appealability does not issue.

Background

The offense conduct. This case arises from Movant and his co-defendants’ conspiracy and attempt to rob a cocaine stash house. *See United States v. Perez*, 661 F.3d 568, 572–73 (11th Cir. 2011). In deciding the direct appeal of Movant’s conviction, the Eleventh Circuit Court of Appeals described the salient facts of the case based on the evidence presented at trial:

On the car ride back from the aborted check-cashing store robbery, [Co-Defendant] Salgado told [Co-Defendants] Perez and Del Monte about the potential cocaine stash house robbery. The hold-up would be made possible by the cooperation of a disloyal drug courier “Juan,” who was actually an undercover Miami–Dade detective. “Juan” would receive the location of the stash house after collecting his bimonthly delivery of twenty to thirty kilograms of cocaine from the Tamiami Airport. He would then convey this information to the CI, allowing Salgado and his coconspirators to steal the drugs from armed guards brought to the stash house from Mexico. Perez and Del Monte embraced the proposal, adding that although more than three intruders would be needed, they “had the people for that.”

Preparations for the robbery moved quickly. On August 21, 2007, the CI,

Salgado, and “Juan” met to discuss their progress. Salgado reported that Perez and Del Monte wanted to overpower and immobilize the stash house guards shortly after they learned the stash house’s location. They would then relieve “Juan” of the cocaine upon his arrival. “Juan” agreed with the plan and advised Salgado that the next shipment would arrive two days later, on August 23, 2007. Immediately following this meeting, Salgado called Perez to inform him of the shipment’s arrival. Perez stated that he would “call the guys” and subsequently contacted [Movant] and [Co-Defendant] Davila. The next evening, Salgado called Perez to confirm that the cocaine would arrive the following afternoon. Perez then called an unidentified male to locate firearms for “work” the next day.

In the early afternoon of August 23rd, the day of the planned robbery, Salgado, Perez, [Movant], Del Monte, and Pereier met at Perez’s apartment to discuss the heist; though Davila was not present, he and [Movant] exchanged three phone calls during this time. Perez stressed the importance of completing the robbery that night, as the next cocaine shipment would not arrive for another twenty days. While the robbery crew all expressed their willingness to go forward, they also wished to meet “Juan” beforehand. Therefore, Salgado, Del Monte, and [Movant] left Perez’s apartment, picked up the CI at a nearby restaurant, and returned.

At Perez’s apartment, the CI apologized for “Juan’s” absence and recounted the robbery’s details. In particular, the conspirators discussed the need to be armed given the near certainty that the show of deadly force would be necessary to succeed. For example, [Movant] described how the Mexican guards would “kill you” to protect the drugs. Perez asked [Movant] if Davila would supply the necessary weapons. [Movant] replied that Davila had “four weapons and a shotgun,” including a machine gun, and stated that they would need five hoods and plastic handcuffs. Perez noted that the machine gun would intimidate the guards. Because the transportation of guns would increase their risk of detection, they decided that the firearms would be transported in a separate vehicle. If police stopped that vehicle, the other car would create a distraction to allow it to escape.

After the CI stated that “Juan” would contact him within an hour, [Movant] and Davila exchanged two telephone calls; Davila arrived shortly thereafter. When the CI announced that he received “Juan’s” call, Perez and his nephew placed a long firearm and a handgun into a black bag. Davila, [Movant], and the CI carried this bag from the apartment and placed it in the rear of the CI’s car. Davila took additional firearms from his car and put them in the CI’s vehicle.

At this point, Salgado, Perez, Del Monte, [Movant], Davila, and Pereier entered Perez’s SUV and began following the CI to the pre-robbery rendezvous with “Juan.” Throughout the 30 to 40-minute journey, Del Monte, [Movant], and Davila phoned the CI to discuss the plan. Task force enforcement officers stopped the robbery crew’s car just short of its destination under the pretext of controlling traffic around a vehicular accident. The officers searched the car and found Del Monte in possession of five knit stocking caps and pepper spray; Perez and Davila

both possessed knives. A search of the CI's vehicle uncovered five loaded firearms: a .12 gauge shotgun, an AK-47 rifle, a .38 caliber revolver, a .9mm Berretta, and a .44 magnum.

Id. at 574–76 (alterations added).

In 2008, a federal grand jury returned a five-count Superseding Indictment charging Movant with: conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. section 846 (Count 3); attempt to possess with intent to distribute cocaine, in violation of 21 U.S.C. section 846 (Count 4); conspiracy to commit Hobbs Act robbery of the stash house, in violation of 18 U.S.C. section 1951(a) (Count 5); attempted Hobbs Act robbery of the stash house, in violation of 18 U.S.C. section 1951(a) (Count 6); and carrying and possessing a firearm during and in relation to a crime of violence and a drug-trafficking crime, as set forth in Counts 3 through 6, in violation of 18 U.S.C. sections 924(c)(1)(A) and 2 (Count 7). (*See* Superseding Indictment [CR ECF No. 176]¹ 3–8²).

Verdict, jury instructions, and conviction. Movant proceeded to a jury trial. *See Perez*, 661 F.3d at 573. A jury found Movant guilty of Counts 5, 6, and 7; and acquitted him of Counts 3 and 4. (*See generally* Verdict [CR ECF No. 527]).

At trial, with respect to Count 7 — Movant's section 924(c) charge — the jury instructions stated the jury could convict if it found (1) Movant “committed a drug trafficking offense or crime of violence charged in Count 3, 4, 5 or 6[,]” and (2) Movant, during the commission of the crime, “knowingly carried a firearm in relation to” or “possessed the firearm in furtherance of that drug trafficking crime or crime of violence[.]” (Ct.'s Instr. to Jury [CR ECF No. 533] 9 (alterations

¹ References to docket entries in Movant's criminal case, Case No. 07-cr-20714, are denoted as “CR ECF No.”

² The Court uses the pagination generated by the electronic CM/ECF database, which appears in the headers of all court filings.

added)). The jury's general verdict did not specify which of Counts 5 or 6 — conspiracy to commit Hobbs Act robbery or attempted Hobbs Act robbery, respectively — was the basis for convicting Movant of Count 7.

On June 30, 2009, the Court sentenced Movant to 360 months' imprisonment, consisting of 60 months each for Counts 5 and 6 — to be served concurrently with each other and concurrently with the sentence imposed in Counts 1 through 3 in case number 08-20704-cr; and 300 months as to Count 7, to be served consecutively to the terms in Counts 5 and 6 and consecutively to the sentence imposed in case number 08-20704-cr. (*See* J. [CR ECF No. 602] 2). The Court also sentenced Movant to supervised release: three years for each of Counts 5, 6, and 7, with all terms running concurrently. (*See id.* 3).

Appeal and postconviction proceedings. In 2011, the Eleventh Circuit affirmed Movant's conviction. *See generally Perez*, 661 F.3d 568. Movant filed his first section 2255 motion to vacate his sentence in 2016, challenging his section 924(c) conviction based on the United States Supreme Court's decision in *Johnson v. United States*, 576 U.S. 591 (2015). *See Fernandez v. United States*, No. 16-cv-25087, Mot. Under 28 U.S.C. § 2255 . . . [ECF No. 1] (S.D. Fla. Nov. 30, 2016). The Court denied Movant's section 2255 motion as untimely or alternatively, as procedurally defaulted. *See id.*, Order [ECF No. 16] (S.D. Fla. Feb. 20, 2018).

After obtaining permission from the Eleventh Circuit (*see* [ECF No. 1] 1–8), Movant filed his present Motion seeking to vacate his section 924(c) conviction based on the United States Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019). Specifically, Movant challenges his section 924(c) conviction and sentence — Count 7 — on the basis that the conviction may have rested on section 924(c)'s now-voided residual clause and is thus unconstitutional under *Davis*. (*See* Mot. 1, 4 (citing *Davis*, 139 S. Ct. 2319)).

Analysis

Procedural default. The Government contends Movant procedurally defaulted his claim. (See Answer 25–28). The Court agrees.

“Under the procedural default rule, a defendant generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting that claim in a [section] 2255 proceeding.” *McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011) (alteration added; quotation marks and citation omitted). “But the [procedural-default] bar is not absolute.” *United States v. Bane*, 948 F.3d 1290, 1294 (11th Cir. 2020) (alteration added). A defendant “can overcome it if he establishes cause and prejudice.” *Id.* (citation omitted).

Recently, in *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021), the Eleventh Circuit held that a vagueness-based challenge to the section 924(c) residual clause was not sufficiently novel to establish cause. *See id.* at 1287–88 (“[T]he case law extant at the time of [the movant’s] appeal confirms that he did not then lack the building blocks of a due process vagueness challenge to the [section] 924(c) residual clause. . . . [The movant] cannot show cause to excuse his procedural default.” (alterations added; citation omitted)); *see also Martinez v. United States*, -- F. App’x --, 2021 WL 1561593, at *2 (11th Cir. Apr. 21, 2021) (“[A]lthough *Davis* announced a new constitutional rule of retroactive application, it was not a sufficiently clear break with the past such that an attorney would not reasonably have had the tools necessary to present the claim before that decision.” (alteration added; quotation marks omitted; citing *Granda*, 990 F.3d at 1286)). *Granda’s* reasoning applies here; Movant thus cannot show cause to excuse his default.

The Court also agrees with the Government that Movant cannot show actual prejudice. (See Answer 27). “Actual prejudice means more than just the possibility of prejudice; it requires that the error worked to the [movant’s] actual and substantial disadvantage, infecting his entire

trial with error of constitutional dimensions.” *Granda*, 990 F.3d at 1288 (alteration added; quotation marks and citation omitted). To satisfy this standard, Movant must show “a substantial likelihood that the jury relied *only* on the Hobbs Act conspiracy conviction, because reliance on a[] . . . [valid predicate] would have provided a wholly independent, sufficient, and legally valid basis to convict Movant of the [section] 924(c) . . . offense[.]” *Rodriguez v. United States*, No. 03-20759-cr, 2021 WL 1421698, at *2 (S.D. Fla. Apr. 15, 2021) (alterations added; other alterations adopted; original emphasis; quotation marks omitted; quoting *Granda*, 990 F.3d at 1288).

Movant cannot satisfy this standard. As the Eleventh Circuit observed regarding Movant’s Co-Defendant, who was situated in the same vehicle as Movant, “[t]he record evidence support[ed] a reasonable conclusion that [Movant’s Co-Defendant] had both (1) knowledge of the guns being transported to the robbery site and (2) intent that those guns be used — either by him or his coparticipants — in the robbery of the fictional cocaine stash house[;] [t]hus, [Movant’s Co-Defendant — and by extension, Movant —] constructively and jointly possessed the guns” during the attempt to commit Hobbs Act robbery. *Perez*, 661 F.3d at 577 (alterations added); *see also id.* at 578–79 (“The [] evidence . . . sufficiently permitted the jury to infer that [Movant’s Co-Defendant] knew of the presence of the firearms being transported to the [fictional drug house] . . . [and] [Movant’s Co-Defendant], *jointly with his coconspirators*, constructively possessed the guns.” (alterations and emphasis added; footnote call number omitted)); *id.* at 573 (“In this appeal, *all appellants* challenge the sufficiency of the evidence to support their convictions.” (emphasis added)). The jury convicted Movant of attempted Hobbs Act robbery. The jury could not have concluded Movant carried a firearm during and in relation to, and possessed a firearm in furtherance of, the Hobbs Act conspiracy without also finding he did the same as to his attempted Hobbs Act robbery. Movant thus cannot show actual prejudice.

Since Movant cannot show cause or actual prejudice, Movant cannot overcome procedural

default.³

The merits. Movant’s Motion also fails on the merits. In *Granda*, the Eleventh Circuit found “[t]he inextricability of the alternative predicate crimes compels the conclusion that the error [the movant] complains about — instructing the jury on a constitutionally invalid predicate as one [of] several [] potential alternative predicates — was harmless.” 990 F.3d at 1292 (alterations added). The same is true here.

Movant’s conspiracy-to-rob predicate offense was inextricably intertwined with the other predicate offense of attempted Hobbs Act robbery. *Compare Perez*, 661 F.3d at 577 (“The record evidence support[ed] a reasonable conclusion that [Movant’s Co-Defendant] had both (1) knowledge of the guns being transported to the [fictional drug house] and (2) intent that those guns be used — either by him or his coparticipants — in the robbery of the fictional cocaine stash house[;] [t]hus, [Movant’s Co-Defendant] constructively and jointly possessed the guns” during his attempted robbery. (alterations added)), with *id.* at 578 (“[T]he evidence at . . . trial permitted a reasonable jury to conclude that [Co-Defendant] Del Monte, *jointly with his coconspirators*, constructively possessed the guns.” (alterations and emphasis added)). Movant makes no showing that the jury relied solely on the invalid predicate in convicting him under section 924(c).

“There is little doubt that if the jury found that [Movant] conspired to possess a firearm in furtherance of his conspiracy to commit Hobbs Act robbery, it also found that he conspired to possess a firearm in furtherance of the other crime-of-violence . . . predicate[] of which the jury convicted him.” *Granda*, 990 F.3d at 1293 (alterations added). Any error in instructing Movant’s

³ Movant does not address, much less show, he is entitled to the actual innocence exception. (*See generally* Mot.). In any event, the Court finds “the same shortcoming that prevents [Movant] from showing actual prejudice — that the . . . crime-of-violence predicate[] [is] inextricably intertwined with the invalid conspiracy-to-rob predicate — makes it impossible for [Movant] to show that his [section] 924(c) conviction was in fact based on the conspiracy-to-rob predicate.” *Granda*, 990 F.3d at 1292 (alterations added).

jury on the invalid predicate offense was harmless.⁴ Movant is not entitled to section 2255 relief.⁵

Certificate of Appealability

A movant seeking to appeal a district court's final order denying his motion to vacate has no absolute entitlement to appeal and must obtain a certificate of appealability to do so. *See* 28 U.S.C. § 2253(c)(1); *see also Harbison v. Bell*, 556 U.S. 180, 183 (2009). The Court should issue a certificate of appealability only if the movant makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a district court has rejected a movant's constitutional claims on the merits, the movant must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Upon review, the Court concludes reasonable jurists would not find her assessment of Movant's claims debatable or wrong. *See, e.g., Granda*, 990 F.3d 1272; *Foster*, 996 F.3d 1100.

Conclusion

Accordingly, it is **ORDERED AND ADJUDGED** that Movant, Luis Fernandez's Motion to Vacate Pursuant to 28 U.S.C. [Section] 2255 [ECF No. 8] is **DENIED**. A certificate of appealability shall not issue. Final judgment shall issue by separate order. The Clerk of Court is directed to **CLOSE** this case. Because there are no issues with arguable merit, an appeal would not be taken in good faith, and thus, Movant is not entitled to appeal *in forma pauperis*.

⁴ Although the Court acknowledges it previously issued an inconsistent decision in this regard, there no longer is doubt as to the standard that applies to Movant's claims. *Granda* defeats Movant's claims.

⁵ The *Granda*, 990 F.3d 1272, and *Foster v. United States*, 996 F.3d 1100 (11th Cir. 2021), decisions rejected several of the arguments raised by Movant in his Motion.

CASE NO. 20-23034-CIV-ALTONAGA

DONE AND ORDERED in Miami, Florida, this 28th day of June, 2021.



CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record