APPENDIX

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APPENDIX A

In the

United States Court of Appeals

For the Eleventh Circuit

No. 25-12042

COREY DURAN BERRY,

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. 1:23-cv-24416-CMA

ORDER:

Corey Berry is a federal prisoner who was convicted, as relevant, of brandishing a firearm during the commission of attempted carjacking, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). He moves, through counsel, for a certificate of appealability ("COA") on whether federal courts are precluded from granting a 28 U.S.C. § 2255 motion under *United States v. Davis*, 588 U.S. 445 (2019),

when the record is unclear about whether a § 924(c) conviction was based on the now-invalid residual clause.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denied a constitutional claim on the merits, the movant must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted).

This Court will not issue a COA when a claim is foreclosed by binding circuit precedent, as reasonable jurists will follow controlling law. *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015). This Court has to follow its own precedent until it is overruled by an en banc decision, or by clearly on point Supreme Court precedent that directly conflicts with our prior holding. *See United States v. White*, 837 F.3d 1225, 1228 (11th Cir. 2016); *United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009).

This Court's precedent dictates that a § 2255 movant bears the burden to show that, more likely than not, his § 924(c) conviction resulted solely from the application of the residual clause. *See Beeman v. United States*, 871 F.3d 1215, 1222 (11th Cir. 2017); *Fernandez v. United States*, 114 F.4th 1170, 1178 (11th Cir. 2024). A movant "cannot succeed if all he can show is that the district court *could* have relied on the residual clause." *Fernandez*, 114 F.4th at 1178.

Here, reasonable jurists would not debate the district court's application of the *Beeman* framework to Berry's *Davis* claim. *See Slack*, 529 U.S. at 484. Our precedent makes clear that *Beeman* governs *Davis* claims, and, under *Beeman*, an unclear record on whether the court relied on the residual clause is insufficient for relief. *Fernandez*, 114 F.4th at 1178; *Hamilton*, 793 F.3d at 1266.

Although Berry argues that denying a COA when circuit precedent forecloses a claim is inconsistent with Supreme Court precedent, he has not demonstrated that *Hamilton* directly conflicts with any clearly on point Supreme Court cases. *See Kaley*, 579 F.3d at 1255. On the contrary, determining whether a claim is foreclosed requires only a "threshold inquiry into the underlying merit of [the] claims," and helps differentiate "those appeals deserving of attention from those that plainly do not." *See Miller-El v. Cockrell*, 537 U.S. 322, 327, 337 (2003).

Because Berry's arguments are foreclosed by this Court's precedent, his motion for a COA is DENIED.[1]

/s/ Nancy G. Abudu

UNITED STATES CIRCUIT JUDGE

[1] To the extent that Berry seeks a COA on whether courts must grant a COA "if the issue is debatable among reasonable jurists, even if there is controlling circuit authority to the contrary," the motion is DENIED because that question does not implicate the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

NO. 25-12042-J

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

COREY DURAN BERRY,
Plaintiff/Appellant,

v.

UNITED STATES OF AMERICA,
Respondent/Appellee.

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

MOTION FOR CERTIFICATE OF APPEALABILITY BY PLAINTIFF/APPELLANT COREY DURAN BERRY

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Corey Duran Berry v. United States of America
Case No. 25-12042-J

Appellant, Corey Duran Berry, files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1, and also includes additional persons and entities who have an interest in the outcome of this case and were omitted from the appellant's original certificate.

A.H.C., Victim

Altonaga, Honorable Cecilia M., United States District Judge

Bergmann, Janice L., Assistant Federal Public Defender

Berry, Corey Duran, Plaintiff/Appellant

Caruso, Michael, Former Federal Public Defender

Davis, Michael S., Assistant United States Attorney

Dopico, Hector A., Federal Public Defender

Fernandez, Eloisa Delgado, Assistant United States Attorney

Ferrer, Wifredo A., Former United States Attorney

Garber, Honorable Barry L., United States Magistrate Judge

Gonzalez, Juan Antonio, Former United States Attorney

Goodman, Honorable Jonathan, United States Magistrate Judge

Greenberg, Benjamin G., Former United States Attorney

Lapointe, Markenzy, Former United States Attorney

L.B., Victim

L.G., Victim

Matzkin, Daniel, Chief, Appellate Division, United States Attorney's Office

Natale, Anthony, Former Federal Public Defender

Noto, Kenneth, Former Assistant United States Attorney

O'Byrne, Hayden P., United States Attorney

O'Sullivan, Honorable John J., United States Magistrate Judge

O.M.F., Victim

Padilla, Joaquin E., Former Assistant Federal Public Defender

P.R., Victim

Reid, Honorable Lisette M., United States Magistrate Judge

Simonton, Hon. Andrea, Former United States Magistrate Judge

United States of America, Plaintiff/Appellee

Watson, Brooke C., Assistant United States Attorney

s/Janice L. Bergmann
Janice L. Bergmann

APPENDIX B

MOTION FOR CERTIFICATE OF APPEALABILITY

Comes now Petitioner/Appellant, Corey Duran Berry, by and through undersigned counsel, and respectfully requests that this Court grant him a certificate of appealability on the following questions:

1. Are federal courts precluded from granting a federal prisoner's 28 U.S.C. § 2255 motion in light of *United States v. Davis*, 588 U.S. 445 (2019), where the record is unclear about whether the conviction was based on the now-invalid residual clause?
2. Whether a certificate of appealability must be granted if the issue is debatable among reasonable jurists, even if there is controlling circuit authority to the contrary?

In support of his request, Mr. Berry states as follows:

LEGAL BACKGROUND

The Armed Career Criminal Act ("ACCA") requires a fifteen-year mandatory minimum for federal defendants convicted of certain firearms offenses. 18 U.S.C. § 924(e). The enhancement applies where the defendant convicted of being a felon in possession of a firearm

has three "violent felonies" or "serious drug offenses." ACCA defines a "violent felony" as a felony that: "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). Subsection (i) is known as the "elements clause." The first half of the definition in subsection (ii) is known as the "enumerated-offense clause," and the second half of the definition in subsection (ii) is known as the "residual clause."

In *Johnson v. United States*, 576 U.S. 591 (2015), the Supreme Court held that ACCA's residual clause was unconstitutionally vague. *Johnson*, however, left undisturbed the validity of both the elements and enumerated-offense clauses. *Id.* at 2563. The Supreme Court later held that *Johnson* announced a new, substantive rule of constitutional law, and it therefore had retroactive effect to cases on collateral review. *Welch v. United States*, 578 U.S. 120 (2016).

Subsequently, in *United States v. Davis*, 588 U.S. 445 (2019), the

Supreme Court declared unconstitutionally vague a very similar residual clause in 18 U.S.C. § 924(c). Section 924(c) imposes (at least) a five-year mandatory prison sentence consecutive to any other sentence, as well as a statutory maximum of life imprisonment, for possession of a firearm "during and in relation to any crime of violence or drug trafficking crime." 18 U.S.C. § 924(c)(1)(A). The statute provides two definitions for "crime of violence": 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 be used in the course of committing the offense." 18 U.S.C. § 924(c)(3). The former definition is referred to as § 924(c)'s "elements clause"; the latter is known as its "residual clause."

In *Davis*, the Supreme Court declared unconstitutionally vague the "residual clause" definition in § 924(c)(3)(B) but left undisturbed the remaining "elements clause" definition. This Court subsequently held that *Davis* announced a new rule of constitutional law made retroactive

by the Supreme Court, satisfying the criteria in section 2255(h)(2) for second or successive section 2255 motions. *In re Hammoud*, 931 F.3d 1032, 1037–39 (11th Cir. 2019). As a result of that holding, federal prisoners could seek authorization to file second or successive section 2255 motions to vacate their section 924(c) convictions in light of *Davis*.

A court of appeals must grant authorization for leave to file a second or successive section 2255 motion where, *inter alia*, the movant makes a "prima face" showing that his motion "contain[s] . . . 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), 2244(b)(3)(C). After authorization, the district court must evaluate whether the successive motion actually satisfies the statutory requirements; if not, it must deny the motion. *See* 28 U.S.C. § 2244(b)(4); *Tyler v. Cain*, 533 U.S. 656, 660–61 & n.3 (2001) (contrasting the prima facie showing required for authorization with the actual showing required in the district court). 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).

After the Supreme Court decided *Johnson*, questions arose regarding the showing a section 2255 movant need make to obtain relief. In *Beeman v. United States*, 871 F.3d 1215 (2017), a divided panel of this Court held that to prove a *Johnson* violation in an initial § 2255 motion, the movant bears the burden to prove by a preponderance of the evidence that the sentencing court relied solely on the residual clause. *Id.* at 1221–25. As a result, where it was "just as likely that the sentencing court relied on the elements or enumerated offenses clause, solely or as an alternative basis for the enhancement, then the movant has failed" to meet his burden. *Id.* at 1222. The court rejected the argument that this holding "would make the outcome depend on the 'fluke' of a district court having expressly stated which clause it was relying on." *Id.* at 1224.

Sitting by designation, Judge Kathleen Williams dissented. She opined that courts must apply current Supreme Court elements-clause precedent to determine an entitlement to relief on a *Johnson* claim, noted that "many district courts across the country have adopted this

approach in evaluating *Johnson* claims . . . with an unclear sentencing record," and concluded the majority's contrary approach "not only would be unfair" to movants, "but also would nullify the retroactive effect of a change in the law pronounced by the Supreme Court." *Id.* at 1226–28. She argued that the majority's approach would "lead to unwarranted and inequitable results," for she could "see no basis for predicating a defendant's right to relief on the precision of the verbiage employed by a judge . . . at the time of sentencing." *Id.* at 1228–29. She concluded: "I fear that the practical effect of today's opinion is that many criminal defendants . . . who were, in fact, sentenced under a constitutionally infirm statute will be denied their right to seek the relief to which they may very well be entitled by the holdings of the Supreme Court." *Id.* at 1231.

Recently, in *Fernandez v. United States*, 114 F.4th 1170, 1182 (11th Cir. 2024), *ptn. for cert. filed*, No. 24-7240 (May 19, 2025), this Court extended *Beeman* to another "infirm statute" – section 924(c). There, the Court held that it "cannot sidestep prior precedent even if" the Court disagreed with it, and held that it was "required to apply"

Beeman to hold that section 2255 movants challenging section 924(c) convictions under *Davis* must also demonstrate as a matter of "historical fact" that the conviction resulted from the unconstitutional residual clause as opposed to the elements clause. *Fernandez*, 114 F.4th at 1182.

Judge Rosenbaum, the author of the majority opinion, issued a lengthy concurrence opining that "*Beeman* itself is wrong" because it was "unmoored from the text of 28 U.S.C. § 2255." *Id*. at 1183. She noted that the circuits were divided on that question, and the circuits following *Beeman* also failed to consider the statutory text. *Id*. at 1186 n.3. Judge Newsom also authored a separate concurrence, opining that *Beeman*'s "historical fact" inquiry "contradicts the Supreme Court's holding in *Rivers v. Roadway Express, Inc*.," 511 U.S. 298, 312–13 n.13 (1994). *Id*. at 1188.

As Judge Rosenbaum's concurrence noted, the courts of appeals are now divided 7-3 on whether federal prisoners seeking relief under *Johnson* or *Davis* must prove that the district court relied on the residual clause. *Fernandez*, 114 F.4th at 1186 n.3. This Court, as well

as the First, Fifth, Sixth, Eighth, Tenth, and the District of Columbia Circuits require movants to prove that the district court relied solely on the residual clause. *See id.* By contrast, the Third, Fourth, and Ninth Circuits have held that it is sufficient that the district court *may have* relied on the residual clause, and that the movant could no longer be sentenced under the ACCA or convicted under section 924(c), as the case may be, under current law. *See id.* The Second and Seventh Circuits have taken no position, but each have noted the conflict. *See Savoca v. United States*, 21 F.4th 225, 234 n.7 (2d Cir. 2021) ("there is currently a circuit split as to a petitioner's burden of proof where the sentencing record is 'unclear' as to which ACCA clause an original sentencing court relied on"); *Waagner v. United States*, 971 F.3d 647, 655 & n.8 (7th Cir. 2020) (same).

Mr. Fernandez's petition for writ of certiorari is currently pending before the Supreme Court. *Luis Fernandez v. United States*, No. 24-7240 (U.S. May 19, 2025). The petition raises the first question presented herein: "Are federal courts precluded from granting a federal prisoner's 28 U.S.C. § 2255 motion in light of *United States v. Davis*, 588

U.S. 445 (2019), where the record is unclear about whether the conviction was based on the now-invalid residual clause?" The Supreme Court ordered the government to respond to the petition on June 10, 2025. The government's response is currently due on August 11, 2025.

PROCEDURAL BACKGROUND

A. Conviction, Sentencing, and Direct Appeal.

In 2013, a grand jury in the Southern District of Florida returned a four-count indictment against Mr. Berry, charging him with attempted carjacking, in violation of 18 U.S.C. § 2119(1) (Count One); brandishing a firearm during and in relation to a crime of violence – specifically, the attempted carjacking in Count One – in violation of 18 U.S.C. § 924(c)(1)(A) (Count Two); carjacking, in violation of 18 U.S.C. § 2119(1) (Count Three); and brandishing a firearm during and in relation to a crime of violence – specifically, the carjacking in Count Three – in violation of 18 U.S.C. § 924(c)(1)(A) (Count Four). DE 25: 2.

Mr. Berry pled guilty to Counts One, Two, and Three in exchange for the government's dismissal of Count Four. *Id.* The district court

ultimately imposed a total term of imprisonment of 218 months, comprised of concurrent sentences of 134-months on Counts One and Three, and a consecutive 84-month term of imprisonment for the § 924(c) conviction on Count Two. *Id.* This Court granted Mr. Berry's motion to dismiss his appeal. *Id.*

B. Prior Section 2255 Proceedings.

In June 2016, Mr. Berry filed a 28 U.S.C. § 2255 motion in which he argued that his § 924(c) conviction on Count Two was invalid because its predicate offense – the attempted carjacking in Count One – no longer qualified as a crime of violence in light of *Johnson*. DE 25: 3. The district court denied that motion in February 2017. *Id.* This Court denied a certificate of appealability. Order, *Berry v. United States*, No. 17-12473 (11th Cir. Nov. 27, 2017). The Supreme Court denied a petition for writ of certiorari. *Berry v. United States*, 138 S. Ct. 2665 (2018).

In October 2023, Mr. Berry sought leave from this Court to file a second or successive § 2255 motion. In his application, he sought leave to challenge his § 924(c) conviction on Count Two. He argued that his

§ 924(c) conviction was invalid in light of *Davis* and *United States v. Taylor*, 596 U.S. 845 (2022), in which the Supreme Court held that attempted Hobbs Act robbery does not satisfy section 924(c)'s elements clause, and which also rejected the framework this Court used to analyze whether an attempt offense is a "crime of violence" for purposes of section 924(c).

On October 31, 2023, this Court granted Mr. Berry's application. *In re: Corey Duran Berry*, 11th Cir. No. 23-13310, DE 2-1: 11 (11th Cir. Oct. 31, 2023). The Court concluded that Mr. Berry "made a prima facie showing that his proposed *Davis* claim challenging his § 924(c) conviction in Count 2 satisfies the statutory criteria" in § 2255(h) governing the filing of second or successive § 2255 motions "when analyzed alongside *Taylor*'s interpretation of § 924(c)(3)(A)'s elements clause." *Id*.

C. Instant Section 2255 Proceedings.

Thereafter, Mr. Berry filed the successive section 2255 motion authorized by this Court in the district court. DE 1. The motion challenged the validity of his conviction and sentence in light of *Davis*

and *Taylor*. *See id*.

The district court referred the motion to a magistrate judge who, on December 30, 2021, entered a report recommending that the motion be denied. DE 18. The magistrate judge determined that attempted carjacking was a "crime of violence" for purposes of 18 U.S.C. § 924(c)(3)(A). *Id*. at 12. She further concluded that under *Beeman* and *Fernandez*, Mr. Berry was not entitled to relief because he could not demonstrate that he was convicted solely under the residual clause in § 924(c)(3)(B). *Id*. at 7-8.

Mr. Berry filed objections, DE 21, arguing that the Report erred in concluding that attempted carjacking was a "crime of violence," *id*. at 1-15, that *Beeman* was wrongly decided, and that under the correct standard he had demonstrated entitlement to relief, *id*. at 15-20. The government responded, stating that "[u]pon further consideration" it would no longer argue that attempted carjacking did not qualify as a predicate crime of violence, but asserted that the district court need not reach that issue, because the defendant had procedurally defaulted his claim. DE 23: 2-3. Mr. Berry replied, arguing that the government

had waived its procedural default defense by failing to assert it adequately in its response to the motion, and by failing to object when the magistrate failed to mention procedural default in her report. DE 24: 2-4.

D. The District Court's Decision.

On April 17, 2025, the district court reviewed the magistrate judge's decision *de novo*, denied the motion, and denied a certificate of appealability. DE 25. The same day, it entered final judgment by separate order. DE 26.

The district court expressly declined to consider whether attempted carjacking was a crime of violence for purposes of § 924(c). *Id*. at 8. It also expressly declined to address the government's procedural default argument. *Id*. at 11 n.4. Rather, it adopted the magistrate judge's report in part, and applied *Beeman* and *Fernandez* to conclude that Mr. Berry had not demonstrated entitlement to relief. *Id*. at 8-11. It held that Mr. Berry had not met his burden under *Beeman* and *Fernandez* because the district court never said which clause it applied at the time of his conviction, and because the legal landscape at

the time was silent on the issue. *See id.* It also rejected Mr. Berry's arguments that *Beeman* was wrongly decided. *See id.* Finally, the district court denied a certificate of appealability "because Movant has failed to show reasonable jurists would find [the court's] assessment debatable or wrong." *Id.* at 12 n.5.

Mr. Berry timely appealed on June 12, 2025. DE 27. He now requests a certificate of appealability on the questions stated herein.

MEMORANDUM OF LAW

A certificate of appealability (COA) is required to appeal the denial of a 28 U.S.C. § 2255 petition for writ of habeas corpus. A COA may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To obtain a COA under this standard, the applicant must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). *See also Henry v. Dep't of Corrections*, 197 F.3d 1361, 1364 (11th Cir. 1999).

A petitioner need not establish that he will win on the merits in order make the "substantial showing" required to obtain a COA; he need only demonstrate that the questions he raises are debatable among reasonable jurists. The Supreme Court has emphasized that a court "should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Noting that a COA is necessarily sought in the context in which the petitioner has lost on the merits, the Supreme Court explained, "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus." *Id*. at 338.

Rather, "[a]t the COA stage, the only question is whether" the "claim is reasonably debatable." *Buck v. Davis*, 580 U.S. 100, 115-16 (2019). "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Miller-El*, 537 U.S. at 336-37. For this reason, a COA should be denied only where the district court's

conclusion is "beyond all debate." *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016).

I. Reasonable jurists could debate whether Mr. Berry's motion should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.

The court below applied this Court's precedents in *Beeman* and *Fernandez* to conclude that Mr. Berry was not entitled to section 2255 relief because he failed to demonstrate that the district court relied solely on the unconstitutional residual clause in convicting him under § 924(c). However, the Third, Fourth, and Ninth Circuits disagree with *Beeman* and *Fernandez*. They do not require movants to prove reliance on the residual clause to obtain section 2255 relief. The jurists in those circuits are certainly "reasonable," and also would certainly debate whether the district court should have resolved Mr. Berry's motion in a different manner. At the very least, those same reasonable jurists could certainly debate whether Mr. Berry's arguments that *Beeman* and *Fernandez* were wrongly decided were adequate to deserve

encouragement to proceed further. Thus, under *Slack* and its progeny, this Court must grant a certificate.

In *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017), the court "disagree[d] with the government's position" that a successive § 2255 motion was due to be dismissed "because the record does not establish that the sentencing court relied on the residual clause." *Id.* at 681–82. Instead, the court "agree[d] with the district court's conclusion that Winston's claim for post-conviction relief 'relied on,' at least in part, the new rule of constitutional law announced in *Johnson*." *Id.* at 682. That was so even though "the record does not establish that the residual clause served as the basis" for the enhancement, because "nothing in the law require[d] a court to specify which clause it relied upon in imposing a sentence." *Id.* (internal quotation marks, brackets and ellipsis omitted). The Fourth Circuit refused to "penalize a movant for a court's discretionary choice not to specify under which clause of [the ACCA] an offense qualified as a violent felony." *Id.* For "imposing the burden on movants urged by the government in the present case would result in selective application of the new rule of constitutional law announced in

Johnson . . . , violating the principle of treating similarly situated defendants the same." *Id.* (internal quotation marks omitted). Accordingly, the court "h[e]ld that when an inmate's sentence may have been predicated on application of the now void residual clause and, therefore, may be an unlawful sentence under the holding in *Johnson* . . . , the inmate has shown that he 'relies on' a new rule of constitutional law within the meaning of" the gatekeeping statute. *Id.* (emphasis added).

That holding, moreover, was unaffected by the fact that the movant's claim in that case depended on the "interplay" between *Johnson* and *(Curtis) Johnson v. United States*, 559 U.S. 133 (2010), which narrowed the elements clause. *Id.* at 682 n.4. It explained: "Any argument that Winston's claim did not 'rely on' *Johnson II*, because that claim would not be successful, does not present a procedural bar. Instead, that issue presents the substantive argument whether, even after receiving the benefit of *Johnson II*, the defendant still is not entitled to relief, because his conviction nonetheless falls within the [elements] clause." *Id.* Accordingly, the court proceeded to

the merits of the *Johnson* claim, analyzing whether the movant had three predicate offenses under current law. *Id.* at 682–86. The court of appeals determined that the district court had erred, and it remanded for a determination about whether he remained an armed career criminal. *Id.* at 686. On remand, the district court concluded that he did not, and ordered his immediate release from custody. *United States v. Winston*, 2017 WL 1498104 (W.D. Va. Apr. 25, 2017).

The Ninth Circuit employed a similar approach in *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017). It framed the question as one "that has cropped up somewhat frequently in the wake of *Johnson II* and *Welch*: When a defendant was sentenced as an armed career criminal, but the sentencing court did not specify under which clause(s) it found the predicate 'violent felony' convictions to qualify, how can the defendant show that a new claim 'relies on' *Johnson II*, a decision that invalidated only the residual clause?" *Id.* at 894. Favorably citing *Winston*, the court "h[e]ld that, when it is unclear whether a sentencing court relied on the residual clause in finding that a defendant qualified as an armed career criminal, but it may have, the defendant's § 2255

claim 'relies on' the constitutional rule announced in *Johnson II*." *Id.* at 896 & n.6 (emphasis added).

The court was persuaded that the "situation is analogous to that of a defendant who has been convicted, in a general verdict, by a jury that was instructed on two theories of liability, one of which turns out to have been unconstitutional." *Id.* at 895. Under the so-called "*Stromberg* principle," "[t]he rule in such a situation is clear: 'Where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground.'" *Id.* at 896 (quoting *Griffin v. United States*, 502 U.S. 46, 53 (1991); *see Stromberg v. California*, 283 U.S. 359 (1931). The court acknowledged that, despite a silent record, a claim would not rely on *Johnson* if "binding precedent at the time of sentencing was that crime Z qualified as a violent felony only under" one of the other clauses. *Id.* But that was not the situation in the case before it, since there was no controlling precedent at the time of sentencing, and the legal landscape otherwise indicated that the predicate qualified under both the residual clause and the elements clause. *Id.* at 897. As a result, it

was "unclear whether the district court relied on the residual clause," and therefore the claim implicated *Johnson*. *Id.*

Similar to the Fourth Circuit, the Ninth Circuit then proceeded to the merits, asking "whether the *Johnson II* error [wa]s harmless – in other words, are there three convictions that support an ACCA enhancement under one of the clauses of ACCA that survived *Johnson II*." *Id.* To do so, the court "look[ed] to the substantive law concerning the [elements] clause as it currently stands, not the law as it was at the time of sentencing." *Id.* After doing so in that case, the court concluded that the movant was no longer an armed career criminal, and it therefore reversed the denial of his successive § 2255 motion and instructed the district court to release him from custody immediately. *Id.* at 898–900.

The Third Circuit followed a similar approach in *United States v. Peppers*, 899 F.3d 211 (3rd Cir. 2018). There, the court held that "once a defendant has satisfied § 2255(h)'s gatekeeping requirements by relying on *Johnson*, he may use post-sentencing cases such as *Mathis* [*v. United States*, 579 U.S. 500 (2016)], *Descamps* [*v. United States*, 570

U.S. 254 (2013)], and [*Curtis*] *Johnson* [*v. United States*, 559 U.S. 133 (2010)] to support his *Johnson* claim because they are Supreme Court cases that ensure we correctly apply the ACCA's provisions." *Id.* at 230. Having made this determination, the Third Circuit then "proceed[ed] to consider whether Peppers's prior convictions were properly determined to be predicate offenses under the ACCA." *Id.* at 230. Applying post-sentencing caselaw, it found that Pepper's two Pennsylvania robbery convictions did not categorically constitute violent felonies under the ACCA's elements clause, and also were not enumerated in the ACCA's enumerated offenses clause. *Id.* at 233-34.

Thus, the court reasoned, "the only remaining option, then, is that Peppers was sentenced pursuant to the unconstitutional residual clause." *Id.* at 234. The Third Circuit then moved on to consider whether Pepper's Pennsylvania burglary conviction was a violent felony and concluded that it was. However, because it "decided that Peppers's sentence was imposed due to constitutional error given that he may have been sentenced pursuant to the now-unconstitutional residual clause of the ACCA," it remanded and ordered the district court to

resolve whether that error was harmless. *Id.* at 236. Specifically, it ordered that the district court should analyze in the first instance whether Peppers has at least two other qualifying predicate offenses rendering any constitutional error harmless. *Id.* at 236. It instructed that if the district court concludes that the error was not harmless, "it must proceed to correct Peppers's sentence by removing the sentencing enhancement under the ACCA." *Id.* at 236. The district court did so, finding that Peppers did not qualify as an armed career criminal and resentenced him to the statutory maximum terms of ten years' imprisonment. *See United States v. Peppers*, 779 F. App'x 934, 935 (3d Cir. 2019).

The Third Circuit applies this same approach in the section 924(c) context. *See United States v. Jordan*, 96 F.4th 584, 589 (3d Cir. 2024) (citing *Peppers*).

In accordance with the approach adopted by the Third, Fourth and Ninth Circuits, "[n]umerous district courts around the country ha[d] similarly concluded that the government's position [was] constitutionally untenable." *United States v. Taylor*, 873 F.3d 476, 480

(5th Cir. 2017). Indeed, before contrary circuit decisions began to emerge, "[t]he government's position ha[d] been rejected by virtually every court to have considered the question." *United States v. Wilson*, 249 F. Supp. 3d 305 (D. D.C. 2017) (citing cases); *see Beeman*, 871 F.3d at 1227–28 (Williams, J., dissenting) (citing additional cases). They employed similar reasoning, analogizing the situation to *Stromberg*, observing that courts had not been required to specify the clause upon which they relied, and recognizing that the government's approach would impose an unfair burden on movants, lead to inequitable results, and result in the selective application of *Johnson*. *E.g., Wilson*, 249 F. Supp. 3d at 312–13.

Thus, had Mr. Berry brought his § 2255 motion in the Third Fourth, or Ninth Circuits and the district court had issued a decision with the reasoning adopted by the district court here, those courts would have reversed the district court's decision, and granted Mr. Berry relief despite a silent record. Indeed, numerous defendants in these circuits have obtained section 2255 relief on their section 924(c) convictions after

Davis and *Taylor* – all because they did not have to (impossibly) prove that the district court relied on the residual clause.[1]

Indeed, that is what happened in *Taylor* itself, where the Supreme Court affirmed the Fourth Circuit's decision vacating a section 924(c) conviction predicated on attempted Hobbs Act robbery where the conviction was challenged in a second section 2255 motion based on *Davis*. *See Taylor*, 596 U.S. 845.

To obtain a COA, the applicant must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484 (internal quotation marks omitted). Here, there can be no doubt that "reasonable jurists" in the Third, Fourth, and Ninth

[1] *See, e.g., United States v. Graham*, No. 13-cr-620, DE 237 (D. Md. Oct. 23, 2023); *United States v. Gross*, No. 07-cr-132, DE 80 (D. Md. Sept. 18, 2023); *United States v. Richardson*, 97-cr-5129, DE 470 (E.D. Cal. Jan. 27, 2023); *Walker v. United States*, No. 07-cr-263, DE 498 (M.D. Pa. Dec. 7, 2022); *Jones v. United States*, 2022 WL 4590582 (W.D. N.C. Sept. 29, 2022); *Soto v. United States*, No. 19-cv-21981, DE 17 (D. N.J. July 5, 2022) (government conceding relief in three cases post-*Taylor*); *Murry v. United States*, No. 11-cr-73, DE 555 (E.D. Va. Jan. 19, 2023); *see also United States v. Lorenzana*, 2024 WL 5047224, at *8–10 (S.D.N.Y. Dec. 9, 2024) (granting relief based on the "may have relied" standard adopted by the Third and Fourth Circuits).

Circuits, as well as numerous district courts, "could debate whether" – or even agree that – Mr. Berry's section 2255 motion "should have been resolved in a different matter." *See id.* Certainly, those same "reasonable jurists" would debate Mr. Berry's entitlement to section 2255 relief was an issue adequate to deserve encouragement to proceed further.

It does not matter that Mr. Berry's appeal is likely to fail under this circuit's precedents in *Beeman* and *Fernandez*. He is not "require[d] . . . to prove, before the issuance of a COA, that some jurists would grant [his motion]. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El*, 537 U.S. at 338. This Court cannot decline the application for a COA merely because it believes that Mr. Berry will not demonstrate entitlement to relief. *Id*. at 337.

Accordingly, a certificate of appealability is warranted under *Slack, Miller-El*, and their progeny on the following question:

Are federal courts precluded from granting a federal prisoner's 28 U.S.C. § 2255 motion in light of *United States v. Davis*, 588 U.S. 445 (2019), where the record is unclear about whether the conviction was based on the now-invalid residual clause?

II. Reasonable jurists could debate whether this Court's holding in *Hamilton v. Secretary, Fla. Dep't of Corr.*, 793 F.3d 1261 (11th Cir. 2015), precludes issuance of a COA.

The district court held that no COA should issue on the merits of Mr. Berry's challenge to his 18 U.S.C. § 924(c) conviction because of the binding circuit authority in *Beeman* and *Fernandez*. The district court's COA denial was compelled by *Hamilton v. Secretary, Fla. Dept. of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015). Under *Hamilton*, a COA cannot be granted where circuit precedent forecloses a claim. In this Court's view, "reasonable jurists will follow controlling [circuit] law," and that ends the "debatability" of the matter for COA purposes. *Hamilton*, 793 F.3d at 1266 ("[W]e are bound by our Circuit precedent,

not by [other circuit's] precedent;" circuit precedent "is controlling on us and ends any debate among reasonable jurists about the correctness of the district court's decision under binding precedent") (citation omitted).

This Court's rule that adverse circuit precedent precludes a finding that "reasonable jurists could debate" an issue misapplies the Supreme Court's precedents in *Miller-El* and *Buck*. In *Buck*, the Supreme Court confirmed that "[u]ntil a prisoner secures a COA, the Court of Appeals may not rule on the merits of his case." 137 S. Ct. at 773 (citing *Miller-El*, 537 U.S. at 336). "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id*. (quoting *Miller-El*, 537 U.S. at 327). "This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Id*. (quoting *Miller-El*, 537 U.S. at 336). "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication

of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* (quoting *Miller-El*, 537 U.S. at 336–37).

This circuit's rule improperly requires that a claim be decided on the merits and places too heavy a burden on movants at the COA stage. As the Court explained in Buck:

> [W]hen a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the [Eleventh] Circuit here) inverts the statutory order of operations and "first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits," it has placed too heavy a burden on the prisoner at the COA stage.... Miller–El flatly prohibits such a departure from the procedure prescribed by § 2253.

Id. at 774 (emphasis in original) (citations omitted). Indeed, as the Court stated in *Miller-El*, "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." 537 U.S. at 338. A COA should be denied only where the district court's

conclusion is "beyond all debate." *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016).

That is not the case here. As discussed in Issue I, reasonable jurists in other circuits would have disagreed with the Court's resolution of that issue. Accordingly, a COA is also warranted on the following question:

> Whether a certificate of appealability must be granted if the issue is debatable among reasonable jurists, even if there is controlling circuit authority to the contrary?

CONCLUSION

WHEREFORE, Movant/Appellant, Corey Duran Berry, respectfully requests that this Court grant a certificate of appealability on the questions presented herein.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this pleading complies with the type-volume limitation and typeface requirements of FED. R. APP. P. 27(d)(2)(A), because it contains 5,577 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

This pleading also complies with the requirements of Fed. R. App. P. 32(a)(5) and (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Century Schoolbook.

s/Janice L. Bergmann
Janice L. Bergmann
Attorney for Appellant Berry
Dated: July 14, 2025

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was served via CM/ECF this 14th day of July, 2025, upon Daniel Matzkin, Chief, Appellate Division, United States Attorney's Office, 99 N.E. 4th Street, Miami, Florida 33132-2111 and mailed via U.S. Mail to Mr. Corey Berry, Reg. No. 04535-104, U.S.P. Pollock, P.O. Box 2099, Pollock, LA 71467.

s/Janice L. Bergmann
Janice L. Bergmann

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 23-24416-CIV-ALTONAGA/Reid

COREY DURAN BERRY,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

On November 20, 2023, Movant, Corey Duran Berry filed a Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. [section] 2255 ("Motion") [ECF No. 1], challenging the constitutionality of his federal conviction and sentence in case number 13-cr-20857, in light of recent Supreme Court rulings. On December 30, 2024, Magistrate Judge Lisette M. Reid entered her Report and Recommendation ("Report") [ECF No. 18], recommending the Court deny the Motion. (*See* Report 13).[1] Movant filed Objections [ECF No. 21], to which the Government responded [ECF No. 23], and Movant replied [ECF No. 24]. The Court has carefully considered the Report, the parties' written submissions, the record, and applicable law. For the following reasons, the Report is adopted in part, and Movant's Objections are overruled.

I. BACKGROUND

A. Underlying Criminal Case

On the morning of June 6, 2013, Movant attempted to carjack a man in Hialeah, Florida, by pressing a revolver to the back of the man's head as he stood near the trunk of his Toyota

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

Camry. (*See United States v. Berry*, No. 13-20857-CR, Factual Proffer [CR ECF No. 27] 1, filed on Feb. 18, 2014 (S.D. Fla. 2023)).[2] After taking the man's keys and unsuccessfully trying to start the car, Movant fled the scene with his firearm. (*See id.*). Minutes later, Movant approached a group of four standing near a running Toyota Yaris, threatened them at gunpoint, and drove off with the vehicle. (*See id.* 2). Two days later, police located Movant in the stolen Yaris and took him into custody, whereupon he confessed to both the attempted and completed carjackings. (*See id.*).

In 2013, Movant was indicted for attempted carjacking (Count 1), in violation of 18 U.S.C. section 2119(1); brandishing a firearm during a crime of violence (Count 2), specifically, the attempted carjacking in Count I, in violation of 18 U.S.C. section 924(c)(1)(A)(ii); carjacking (Count 3), in violation of 18 U.S.C. section 2119(1); and brandishing a firearm during a crime of violence (Count 4), specifically, the carjacking in Count 3, in violation of 18 U.S.C. section 924(c)(1)(A)(ii). (*See* Indictment [CR ECF No. 1] 1–3). Movant pled guilty to Counts 1 through 3, and in return, the Government agreed to dismiss Count 4. (*See* Plea Agreement [CR ECF No. 26] 1; Change of Plea Tr. [CR ECF No. 52] 18:9–18:11).

The Court sentenced Movant to 134 months' imprisonment on Counts I and III, to run concurrently, followed by a consecutive 84-month term on Count II — for a total of 218 months' imprisonment. (*See* Sentencing Tr. [CR ECF No. 53] 28:7–28:13; Am. J. [CR ECF No. 49] 2). Although the Plea Agreement contained an appeal waiver (*see* Plea Agreement 5), Movant filed a Notice of Appeal [CR ECF No. 41]. He subsequently moved to dismiss his appeal, and the Eleventh Circuit granted the request. (*See* Jan. 21, 2015 Order of Dismissal [CR ECF No. 54] 2).

[2] References to docket entries in Movant's criminal case, Case No. 13-20857-CR-ALTONAGA, are denoted with "CR ECF No."

B. Section 2255 Proceedings

On June 23, 2016, Movant filed his first motion under 28 U.S.C. section 2255,[3] challenging his conviction on Count 2, imposed under 18 U.S.C. section 924(c)(1)(A)(ii) ("Section 924(c) Conviction"). (*See generally* Mot. to Correct Sentence [CR ECF No. 56]). Section 924(c) mandates a consecutive sentence for using a firearm during and in relation to a crime of violence or a drug-trafficking offense. *See* 18 U.S.C. § 924(c)(1)(A). Under the "residual clause" of section 924(c), a crime of violence is a felony "that 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)(B). Alternatively, under the "elements clause" of section 924(c)(3), a crime of violence is a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]" *Id.* § 924(c)(3)(A) (alteration added).

Movant contended his Section 924(c) Conviction was unlawful because the predicate offense of attempted carjacking no longer qualified as a crime of violence following *Johnson v. United States*, 576 U.S. 591 (2015). (*See* Mot. to Correct Sentence 11–12); *see also In re: Corey Berry*, No. 23-13310, Order [ECF No. 2] 3, filed on Oct. 31, 2023 (11th Cir. 2023). Specifically, Movant asserted that: (1) section 924(c)'s residual clause is unconstitutionally vague because it is materially analogous to the residual clause the Supreme Court invalidated in *Johnson*; and (2) carjacking does not qualify as a crime of violence under the elements clause, as it can be committed through intimidation alone — without actual, attempted, or threatened force. (*See* Mot. to Correct Sentence 12–26); *see also Berry*, No. 23-13310, Order at 3. The Undersigned dismissed the motion (*see generally* Feb. 28, 2017 Order [CR ECF No. 58] 6); the Eleventh Circuit declined to

[3] A prisoner may obtain relief under section 2255 when the trial court imposes a sentence that: (1) violates the Constitution or laws of the United States; (2) exceeds its jurisdiction; (3) exceeds the maximum authorized by law; or (4) is otherwise subject to collateral attack. *See* 28 U.S.C. § 2255(b).

issue a certificate of appealability, *see generally Berry v. United States*, No. 17-12473, 2017 WL 11623201, at *2 (11th Cir. Nov. 27, 2017); and the Supreme Court denied a petition for writ of certiorari, *see generally Berry v. United States*, 585 U.S. 1009 (2018).

In October 2023, Movant sought authorization from the Eleventh Circuit to file a second motion under 28 U.S.C. section 2255. *See generally Berry*, No. 23-13310, Appl. ("Appl.") [ECF No. 1], filed on Oct. 10, 2023 (11th Cir. 2023). As relevant here, such authorization may be granted if the court of appeals certifies that the successive motion contains a claim involving "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).

As in his earlier challenge, Movant insisted that attempted carjacking no longer qualified as a crime of violence, rendering his Section 924(c) Conviction invalid. *See* Appl. at 7–8; *see also Berry*, No. 23-13310, Order at 3. This time he anchored his claim in *United States v. Davis*, 588 U.S. 445 (2019), and *United States v. Taylor*, 596 U.S. 845 (2022). *See* Appl. at 7–8; *see also Berry*, No. 23-13310, Order at 3. In *Davis*, the Supreme Court held that section 924(c)'s residual clause defining a crime of violence is unconstitutionally vague, 588 U.S. at 470 — a decision the Eleventh Circuit recognized as establishing a new rule of constitutional law for purposes of section 2255(h)(2), *see In re Hammoud*, 931 F.3d 1032, 1038 (11th Cir. 2019). Thus, Movant deduced, *Davis* left only the elements clause to support his Section 924(c) Conviction. *See* Appl. at 7–8.

And even that, Movant argued, was foreclosed by *Taylor*, where "the Supreme Court held [that] attempted Hobbs Act robbery [was] not a crime of violence under [section] 924(c)(3)(A)" because it could be completed by a mere attempt to threaten and therefore did not require the use, attempted use, or threatened use of violence. Appl. at 7 (alterations added). From this, Movant reasoned that attempted carjacking, like attempted Hobbs Act robbery, falls outside the elements

clause, "because a completed carjacking can be accomplished through threats alone," and "a defendant can be convicted of an attempted carjacking based on 'attempt to threaten.'" *Id.* at 8.

The Eleventh Circuit concluded that Movant had made the requisite *prima facie* showing under 28 U.S.C. section 2255(h)(2) — that is, that his proposed *Davis* claim met the statutory criteria, authorizing him to file a second section 2255 motion. *See Berry*, No. 23-13310, Order at 11, 14; *see also id.* at 2. But, according to the Eleventh Circuit, that determination "does not conclusively resolve th[e] issue." *Id.* at 13 (alteration added; citing *Jordan v. Sec'y, Dep't of Corrs.*, 485 F.3d 1351, 1357 (11th Cir. 1007)). "[O]nce [a] prisoner files his authorized [section] 2255 motion in the district court, 'the district court not only can, but must, determine for itself whether those requirements are met.'" *Id.* (alterations added; quoting *Jordan*, 485 F.3d at 1357). Indeed, "the statutory language of [section] 2244, which is cross referenced in [section] 2255(h), expressly provides that a district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section." *Id.* (alteration adopted; other alterations added; quotation marks omitted; quoting 28 U.S.C. § 2244(b)(4)).

At this stage, Movant "bear[s] the burden of showing that he is actually entitled to relief on his *Davis* claim, meaning he [must] show that his [section] 924(c) conviction resulted from application of solely the residual clause." *Hammoud*, 931 F.3d at 1041 (alterations added; citing *Beeman v. United States*, 871 F.3d 1215, 1222–25 (11th Cir. 2017); other citation omitted). As relevant here, to meet that standard, Movant must show it was more likely than not that the sentencing court relied solely on the residual clause to qualify the predicate offense as a crime of violence; if the record leaves it equally plausible that the court based its finding on the elements clause — whether exclusively or in the alternative — Movant cannot carry his burden. *See*

Beeman, 871 F.3d at 1221 (citation omitted); *see also Fernandez v. United States*, 114 F.4th 1170, 1179–80 (11th Cir. 2024) (applying *Beeman*'s framework to section 924(c) (citations omitted)). "To determine this 'historical fact' [the court] look[s] first to the record, and then, if the record proves underdeterminative, [it] can look to the case law at the time of sentencing." *United States v. Pickett*, 916 F.3d 960, 963 (11th Cir. 2019) (alterations added).

C. Magistrate Judge's Report

Applying *Beeman*, the Magistrate Judge determined that Movant has not met his burden to show that he is entitled to relief on his *Davis* claim. (*See* Report 13). The Court agrees with that conclusion and, unless otherwise stated, adopts the Report's analysis.

As mentioned, under *Beeman*'s framework, Movant must show that — more likely than not — his Section 924(c) Conviction resulted from a court's application of solely the residual clause. *See Fernandez*, 114 F.4th at 1180 (citation omitted); *see also Beeman*, 871 F.3d at 1222. "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. Second, and alternatively, he may resolve the matter by reference to legal principles alone." *Fernandez*, 114 F.4th at 1180 (alterations adopted; citations and quotation marks omitted).

In this case, the Magistrate Judge began with the record but found no indication that the Undersigned relied on the residual clause. (*See* Report 8). Turning next to the legal landscape at the time of sentencing, the Magistrate Judge concluded it, too, cut against Movant's claim. (*See id.* 8–10). To be sure, the Eleventh Circuit did not squarely address whether attempted carjacking qualified as a crime of violence under the elements clause until after Movant was sentenced, specifically, in a trilogy of cases known as *Ovalles I*, *II*, and *III* — all of which were abrogated by

Davis. *See generally Ovalles v. United States* ("*Ovalles I*"), 861 F.3d 1257 (11th Cir. 2017); *Ovalles v. United States* ("*Ovalles II*"), 905 F.3d 1231 (11th Cir. 2018); and *Ovalles v. United States* ("*Ovalles III*"), 905 F.3d 1300 (11th Cir. 2018). Still, the Magistrate Judge rightly recognized that those decisions nonetheless reflect how courts in the Eleventh Circuit — including this sentencing Judge — generally interpreted the statute when Movant was sentenced. (*See* Report 8–9); *see also Fernandez*, 114 F.4th at 1182 ("[T]he 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." (alteration adopted; other alteration added; citation and quotation marks omitted)). And to that point, each of the *Ovalles* cases held that attempted carjacking satisfied the elements clause. *See Ovalles I*, 861 F.3d at 1267; *Ovalles II*, 905 F.3d at 1253; *Ovalles III*, 905 F.3d at 1304.

The Magistrate Judge also drew support from *United States v. Armstrong*, 122 F.4th 1278 (11th Cir. 2024), a post-*Davis* decision in which the Eleventh Circuit reaffirmed that an "attempt" offense may still qualify as a crime of violence under the elements clause — so long as the statute criminalizes only attempts *occurring by force, violence, or intimidation*, as with attempted bank robbery under 18 U.S.C. section 2113. (*See* Report 9–10 (citing *Armstrong*, 122 F.4th at 1289)). Taken together, the *Ovalles* trilogy and *Armstrong* reinforce the idea that, at the time of Movant's sentencing, there was no Eleventh Circuit case law that made it more likely than not that the sentencing Court relied solely on the residual clause to uphold the Section 924(c) Conviction. (*See id.* 10). On that basis, the Magistrate Judge found that Movant failed to meet his burden under *Beeman* and recommended that the Court deny the Motion. (*See id.* 13).

The Magistrate Judge arguably went a step further, suggesting that even after *Davis*, attempted carjacking categorically qualifies as a crime of violence under the elements clause. (*See*

id. 10–12). The Court does not reach that question. The relevant inquiry is a historical one: whether the Undersigned more likely than not relied only on the now-invalid residual clause. *See Beeman*, 871 F.3d at 1221; *see also Pickett*, 916 F.3d at 963 (citation omitted). On this record, Movant has not made that showing. Notably, even the Government stops short of arguing that attempted carjacking categorically qualifies as a crime of violence under the elements clause, acknowledging that the Court need not reach the issue. (*See* Resp. 2). To the extent the Report takes a position on that question, the Court declines to adopt that portion of the Report.

II. LEGAL STANDARDS

When a party properly objects to a magistrate judge's findings or recommendations, the district court must review the objected-to findings or recommendations *de novo*. *See* 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(3). To trigger that review, the objections must specifically identify both the challenged portions of the report and the grounds for disagreement. *See Macort v. Prem, Inc.*, 208 F. App'x 781, 783 (11th Cir. 2006) (citation omitted). If no specific objections are made, "the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Fed. R. Civ. P. 72 advisory comm.'s note to 1983 addition (citations omitted). As Movant timely filed objections, the Court reviews the Report *de novo*.

III. DISCUSSION

Movant raises two objections to the Report, but only one warrants discussion. First, he challenges the Magistrate Judge's conclusion that attempted carjacking qualifies as a crime of violence under section 924(c)'s elements clause. (*See* Objs. 1–15). Second, he argues that the Magistrate Judge erred in applying *Beeman*. (*See id.* 15–19). As explained, the Court need not resolve whether attempted carjacking categorically qualifies as a crime of violence to adopt the Magistrate Judge's recommendation. Thus, the first objection is overruled, and the Court turns to

the second.

Movant does not dispute that he has not met his burden of showing that he is entitled to relief on his *Davis* claim under *Beeman*'s framework. (*See generally id.*). Instead, he challenges the validity of that framework, contending *Beeman*'s historical inquiry "is unmoored from the text of [section] 2255 and effectively rewrites [section] 2255(b) by raising the burden on [section] 2255 movants beyond that required by the Congress." (*Id.* 16 (alterations added)).

Section 2255(b) directs a court to "vacate and set [a] judgment aside" if it finds "that the sentence imposed was not authorized by law or otherwise open to collateral attack[.]" 28 U.S.C. § 2255(b) (alterations added). Movant interprets this language as requiring only a present-tense inquiry by the Court — specifically, whether the conviction remains legally valid today — regardless of the basis relied upon by the sentencing court. (*See* Objs. 16–17). To that end, he invokes *Taylor*, where the Supreme Court stated that courts were "'not authorized'" to impose mandatory sentences for section 924(c) convictions predicated on attempted Hobbs Act robbery. (*Id.* at 17 (quoting *Taylor*, 596 U.S. at 852)). Movant posits that this same reasoning applies to mandatory sentences for section 924(c) convictions premised on attempted carjacking. (*See id.* 1–15). Thus, in Movant's view, with the residual clause invalidated and attempted carjacking failing to meet the elements clause, the conviction is unlawful and must be vacated. (*See id.*).

The Court is not persuaded. First, *Beeman* remains binding precedent in the Eleventh Circuit and establishes the burden a movant must carry to obtain relief on a successive section 2255 motion raising a *Davis* claim. *See Fernandez*, 114 F.4th at 1179–81 (citations omitted); *see also id.* at 1187 (Rosenbaum, J., concurring) ("[T]he *Beeman* framework contravenes the plain text of [section] 2255(b), undercuts precedent, and threatens the separation of powers. . . . It is wrong, then, to continue to insist that we use it. . . . [But] our prior-panel-precedent rule compels

me to concur in the result[.]" (alterations added)); *United States v. Cotchery*, 406 F. Supp. 3d 1215, 1229 (N.D. Ala. 2019) (explaining that under the prior precedent rule, "courts in the Eleventh Circuit must follow a previous decision of the Eleventh Circuit 'even when a subsequent Supreme Court case weakens that decision,'" unless the precedent is clearly abrogated (alteration adopted; quoting *Overlook Gardens Props., LLC v. ORIX USA, L.P.*, 927 F.3d 1194, 1201 (11th Cir. 2019))).

Second, Movant's reliance on *Taylor* is unavailing. *Taylor* announced a statutory rule, not a constitutional one, and thus cannot "serve as a basis for [Movant's] second . . . motion to pass through [section] 2255(h)(2)'s gateway and on to merits consideration." *Fernandez*, 114 F.4th at 1178 (alterations added; footnote call number omitted); *see also In re Griffin*, 823 F.3d 1350, 1356 (11th Cir. 2016) (citations omitted); 28 U.S.C. § 2255(h). While *Taylor* clarifies that attempted Hobbs Act robbery does not — and never did — qualify as a crime of violence under section 924(c)'s elements clause, 596 U.S. at 852, that statutory holding has no bearing on the constitutional question at the heart of Movant's *Davis* claim: whether his conviction rested solely on the now-invalid residual clause, *see Fernandez*, 114 F.4th at 1180–81 (citations omitted).

As *Fernandez* confirms, that question must be answered by application of *Beeman*'s framework. *Fernandez*, 114 F.4th at 1180. Under that framework, it is "irrelevant" whether the predicate offense fails to qualify under the elements clause today; what matters is whether Movant can meet his "threshold burden" of showing a *constitutional* violation to bring him within the confines of section 2255(h)(2). *See id.* at 1181 (citation and quotation marks omitted). In other words, under *Beeman*, Movant must show that at the time of sentencing, the residual clause was the only available basis for the conviction. *See id.* (citation omitted); *see also Beeman*, 871 F.3d at 1224 n.5 (noting that a court's present-day determination that an offense no longer qualifies

under the elements clause "casts very little light, if any, on the key question of historical fact" — whether the sentencing court relied solely on the residual clause).

To be sure, the Court sees no conflict — let alone abrogation — between *Taylor* and *Fernandez*. *Taylor* addresses the scope of section 924(c)'s elements clause; *Fernandez* applies a burden-of-proof standard for successive motions under section 2255(h)(2). *See generally Taylor*, 596 U.S. 845; *Fernandez*, 114 F.4th 1170. The cases speak to different questions and operate at different stages of analysis. Because *Beeman* remains good law, and the Eleventh Circuit continues to apply it in this context, the Court is bound to do the same.

In a final effort, Movant invokes *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994), for the proposition that "a judicial construction of a statute is an authoritative statement of what a statute meant before as well as after the decision of the case giving rise to that construction." (Objs. 18 (alteration adopted; quotation marks omitted; quoting *Rivers*, 511 U.S. at 312–13)). The Eleventh Circuit agrees, and so does the Undersigned. *See Fernandez*, 114 F.4th at 1180 (confirming that *Taylor* stands for the proposition that attempted Hobbs Act robbery was not a crime of violence at any point). But, again, Movant's "*statutory* challenge to his conviction does not satisfy his burden under [Eleventh Circuit] precedent. [His] second or successive [section] 2255 claim is necessarily a *constitutional* one[.]" *Id.* at 1181 (alterations added; citation omitted; emphases in original); *see also id.* ("[F]or the purposes of [Movant's] *Davis* claim — which turns on the *residual* clause — it is 'irrelevant' whether his prior convictions are invalid predicates under [section] 924(c)'s *elements* clause." (alterations added; citation omitted; emphases in original)).[4]

IV. CONCLUSION

For the foregoing reasons, the Undersigned agrees with the Report's recommendation and

[4] Because the Court adopts the Magistrate Judge's recommendation to deny the Motion on the merits, it does not address the Government's procedural-default argument. (*See* Resp. 6–7; *see also* Reply 2–5).

adopts its analysis in part, as specified. Accordingly, it is

ORDERED AND ADJUDGED that Magistrate Judge Lisette M. Reid's Report and Recommendation **[ECF No. 18]** is **ACCEPTED AND ADOPTED in part**. Movant, Corey Duran Berry's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. [section] 2255 **[ECF No. 1]** is **DENIED**. No certificate of appealability shall issue.[5] The Clerk of the Court is directed to **CLOSE** this case, and all pending motions are **DENIED as moot**.

Final judgment will be entered by separate order.

DONE AND ORDERED in Miami, Florida, this 17th day of April, 2025.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
CHIEF UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Lisette M. Reid
counsel of record

[5] The Magistrate Judge also recommends the Court decline to issue a certificate of appealability because Movant has failed to show reasonable jurists would find her assessment debatable or wrong. (*See* Report 13). The Court agrees. *See Miller-El v. Cockrell*, 537 U.S. 322, 338 (2007) ("The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." (internal quotations marks and citation omitted)).