[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-17751
Non-Argument Calendar

D.C. Docket Nos. 1:16-cv-22379-FAM; 1:94-cr-00333-FAM-1

AUDY PEREZ,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(April 12, 2018)

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

PER CURIAM:

Audy Perez appeals the district court's denial of his second or successive 28 U.S.C. § 2255 motion to vacate his sentence, which he filed with our authorization.

The district court concluded that Perez's claim based on *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015), failed because Perez did not meet his burden of showing that he was sentenced on the basis of the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). On appeal, Perez argues that the district court applied the incorrect burden of proof and failed to evaluate his prior offenses under current law, including *Descamps v. United States*, 570 U.S. 254, 133 S. Ct. 2276 (2013), when determining the effect of *Johnson*. After careful review, we affirm the denial of Perez's § 2255 motion.

I.

In 1994 a jury convicted Perez of one count of possession of a firearm by a convicted felon, 18 U.S.C. § 922(g)(1). The presentence investigation report ("PSR") found that Perez qualified as an armed career criminal under the ACCA, 18 U.S.C. § 924(e), because he had ten prior convictions for burglary in Florida. According to the PSR, nearly all of these convictions were for "burglary of a dwelling" and involved entry into a residence with the intent to commit theft. Perez did not object to the PSR's descriptions of these offenses or his ACCA enhancement.

At Perez's 1995 sentencing, the district court summarily adopted the findings of fact and conclusions of law in the PSR. The court did not specify the basis for qualifying the convictions as "violent felonies." The court simply

commented that Perez had burglarized mostly unoccupied homes, which "is a violent offense and we shouldn't treat it lightly." The court therefore applied the ACCA enhancement, which required a mandatory prison term of at least 15 years, and then sentenced him to 293 months of imprisonment. Without the ACCA enhancement, Perez's maximum term of imprisonment was 10 years. *See* 18 U.S.C. § 924(a)(2) (1994). We affirmed his conviction and sentence on appeal. Perez unsuccessfully pursued collateral relief through a motion to vacate under 28 U.S.C. § 2255.

In June 2016, we granted Perez's motion for leave to file a second or successive § 2255 motion in the district court. We concluded that he had made a prima facie showing that *Johnson* invalidated his ACCA sentence. We emphasized, however, that a prima facie showing does not "conclusively resolve" the issue and that the district court had to determine for itself whether Perez's motion met § 2255's requirements. Specifically, we explained that "[t]he district court must decide whether or not Perez was sentenced under the residual clause in 1995, whether the new rule in *Johnson* is implicated as to Perez's sentencing, and whether the § 2255(h) applicant has established the [§ 2255(h)] statutory requirements for filing a second or successive motion."

A magistrate judge issued a report and recommendation that Perez's motion be granted. Relying on our decision in *In re Chance*, 831 F.3d 1335 (11th Cir.

2016), the magistrate judge found that Perez had shown a valid *Johnson* error because it was unclear whether his ACCA enhancement relied upon the residual clause. Then, applying current law, including *Descamps*, *Mathis v. United States*, 579 U.S. ___, 136 S. Ct. 2243 (2016), and *Mays v. United States*, 817 F.3d 728 (11th Cir. 2016), the magistrate judge concluded that Perez's burglary convictions were not "violent felonies" under the ACCA and so could not support his ACCA enhancement. Accordingly, the magistrate judge recommended granting Perez's § 2255 motion and ordering his immediate release.

The district court, after holding a hearing, disagreed with the magistrate judge and denied Perez's motion. Citing our decision in *In re Moore*, 830 F.3d 1268 (11th Cir. 2016), the court ruled that Perez had failed to show that his sentence was "reasonably likely" to be affected by *Johnson*. The court stated that, at his 1995 sentencing, convictions for burglary of a dwelling in Florida qualified under either the enumerated clause or the residual cause. Because the record was silent as to which clause was used to qualify his convictions, the court concluded that Perez failed to meet the requirements of § 2255(h) by showing that "his sentence was enhanced based on the residual clause." And it was irrelevant that the burglary convictions do not qualify as violent felonies today, in light of *Descamps* and *Mathis*, because, the court explained, those cases could not be the

basis for a second or successive § 2255 motion, and the *Johnson* inquiry was limited to determining the original basis for the ACCA enhancement.

The district court then granted a certificate of appealability as to "the issue presented in [*Moore*] and [*Chance*] regarding the movant's burden to obtain relief under 28 U.S.C. § 2255 and [*Johnson*]." Perez now appeals.

II.

In a 28 U.S.C. § 2255 proceeding, we review the district court's legal conclusions *de novo* and its factual findings for clear error. *Osley v. United States*, 751 F.3d 1214, 1222 (11th Cir. 2014).

The Supreme Court in *Johnson* invalidated the ACCA's residual clause as unconstitutionally vague. 135 S. Ct. at 2557-58, 2563. That holding, however, did not call into question the two other provisions under which a prior conviction can qualify as a "violent felony"—the elements clause and the enumerated clause—for purposes of applying the ACCA enhancement.[1] The Court subsequently made the new rule announced in *Johnson* retroactive to cases on collateral review. *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257, 1264–65, 1268 (2016).

[1] The ACCA defines a "violent felony" as any crime punishable by imprisonment for a term exceeding one year that: (1) has as an element the use, attempted use, or threatened use of physical force against the person of another; (2) is burglary, arson, or extortion, or involves use of explosives; or (3) otherwise involves conduct that presents a serious potential risk of physical injury to another. 18 U.S.C. § 924(e)(2)(B). These three "clauses" are known as the "elements clause," the "enumerated clause," and the "residual clause," respectively. *Mays*, 817 F.3d at 731.

In a *Johnson* claim, the defendant contends that he was sentenced under the ACCA's residual clause. *Beeman v. United States*, 871 F.3d 1215, 1220 (11th Cir. 2017). Following *Johnson* and *Welch*, this Court, in deciding applications for leave to file a second or successive § 2255 motion, offered in *dicta* two conflicting approaches for district courts to follow when adjudicating *Johnson* claims in second or successive § 2255 motions.

In *Moore*, a panel of this Court stated that the defendant must prove "that he was sentenced using the residual clause and that the use of that clause made a difference in the sentence." 830 F.3d at 1273. That means, according to *Moore*, that the court must deny the § 2255 motion if the court "cannot determine whether the residual clause was used in sentencing and affected the final sentence." *Id.*

A different panel of this Court in *Chance* found the *Moore* panel's approach too narrow and too strict. According to *Chance*, the "required showing is simply that § 924(c) may no longer authorize his sentence as that statute stands after *Johnson*." 831 F.3d at 1340–41. In other words, *Chance* said, courts determining the effect of *Johnson* must apply cases like *Descamps* and *Mathis*, which are retroactively applicable on collateral review. *Id.* at 1340.

The parties' initial briefing in this case largely tracks the *Chance* and *Moore* decisions, along with a few other cases we decided in the context of successive applications. The government advocates for *Moore*'s approach; Perez for

Chance's. While this appeal was pending, this Court decided *Beeman*, which resolved the conflict and largely adopted the approach laid out in *Moore*. Both parties have since filed materials addressing *Beeman*.

We held in *Beeman* that "[t]o prove a *Johnson* claim, a movant must establish that his sentence enhancement turned on the validity of the residual clause. In other words, he must show that the clause actually adversely affected the sentence he received." *Beeman*, 871 F.3d at 1221 (alteration adopted) (quotation marks omitted). That burden will be satisfied only if (1) "the sentencing court relied solely on the residual clause, as opposed to also or solely relying on either the enumerated offenses clause or elements clause . . . to qualify a prior conviction as a violent felony"; and (2) "there were not at least three other prior convictions that could have qualified under either of those two clauses as a violent felony, or as a serious drug offense." *Id.*

A movant does not meet his burden under *Johnson* by showing that it is "merely possible that the court relied on that clause to enhance the sentence." *Id.* Rather, if the record is unclear, and it is just as likely that the sentencing court relied on a different clause when it enhanced the defendant's sentence, "then the movant has failed to show that his enhancement was due to use of the residual clause." *Id.* at 1222.

According to *Beeman*, the *Johnson* inquiry in the § 2255 context is one of "historical fact: was [the movant] sentenced solely per the residual clause." *Id.* at 1224 n.5. The movant "bears the burden of proving that historical fact." *Id.* As a result, precedent "announced since . . . the sentencing hearing" does "not answer the question before us." *Id.* To be sure, precedent at the time of sentencing may be circumstantial evidence of the basis for the court's action. For example, *Beeman* suggests, if "the law was clear at the time of sentencing that only the residual clause would authorize a finding that the prior conviction was a violent felony, that circumstance would strongly point to a sentencing per the residual clause." *Id.* But precedent announced after sentencing, even a decision holding that a prior conviction no longer qualifies under either the elements clause or the enumerated clause, "casts very little light, if any," on the historical fact of "whether [the movant] was, in fact, sentenced under the residual clause only." *Id.*

The district court, applying *Moore*, found that Perez had "failed to show that his sentence is reasonably likely to fall within the scope of the new constitutional rule announced in *Johnson*." The court stated that, at the time of his sentencing, Perez's prior Florida convictions for burglary of a dwelling qualified under either the enumerated clause or the residual clause. But the record was silent as to which clause was actually used. Because the sentencing court could have relied on the enumerated clause, the district court reasoned, Perez failed to meet the

requirements of § 2255(h) by showing that "his sentence was enhanced based on the residual clause."

Here, the district court properly found that Perez did not carry his burden under *Johnson*, as that burden is articulated in *Beeman*. Perez concedes that "the record is silent as to which clause—the enumerated, the elements, or the residual—supported the ACCA enhancement." Perez Br. at 7. The sentencing court did not state which clause it relied on to find that his prior convictions qualified as violent felonies. And the PSR referred to § 924(e) generally but did not identify which of § 924(e)(2)(B)'s three clauses served as the basis for the ACCA enhancement.

Looking to the law at the time of Perez's 1995 sentencing, there is little to suggest that the sentencing court relied solely on the residual clause. *See Beeman*, 871 F.3d at 1224 & n.5. The undisputed facts in Perez's PSR, which he is deemed to have admitted by failing to object to them, show that at least three of his burglary convictions met the definition of "generic burglary" for purposes of the enumerated clause. *See Taylor v. United States*, 495 U.S. 575, 599, 110 S. Ct. 2143, 2158 (1990) (defining general burglary as the "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime"); *United States v. Spell*, 44 F.3d 936, 938–39 (11th Cir. 1995) (concluding while evaluating Florida burglary that, to determine if a burglary is generic under the enumerated crimes clause in the Sentencing Guidelines, courts may examine

"easily produced and evaluated court documents, including the judgment of conviction, charging papers, plea agreement, presentence report adopted by the court, and the findings of a sentencing judge").

Nor can our later decision in *United States v. Matthews*, 466 F.3d 1271 (11th Cir. 2006), help Perez carry his burden. In that case, we held that third-degree burglary under Florida law qualified under the residual clause. *Id.* at 1275–76. But we did not address whether that same offense, categorically or otherwise, qualified under the enumerated clause. *Id.* Even if we accept, as Perez contends, that *Matthews* shows that it was not clear that Florida burglary qualified under the enumerated clause at the time of sentencing, *Beeman* prevents us from resolving that uncertainty in his favor. "Where, as here, the evidence does not clearly explain what happened[,] the party with the burden loses." *Beeman*, 871 F.3d at 1225 (quotation marks and ellipsis omitted). So we cannot say that it was clearly erroneous for the district court to conclude that the sentencing court did not rely solely on the residual clause in qualifying Perez's prior convictions for purposes of the ACCA enhancement. *See Osley*, 751 F.3d at 1222.

On this record, the district court properly denied Perez's successive *Johnson* claim because he failed to carry his burden of proof. "Specifically, he failed to prove—that it was more likely than not—he in fact was sentenced as an armed career criminal under the residual clause." *Id.* at 1225.

III.

In his reply brief, Perez argues that *Beeman* does not entirely control this case. He maintains that, because *Beeman* was decided in the first-§ 2255-motion context, it does not govern the district court's determination that Perez failed to satisfy the "gatekeeping" requirements of § 2255(h), which applies to second or successive motions only. He also contends that *Beeman* was wrongly decided and that it conflicts with prior Supreme Court precedent.

To give some context to Perez's first argument, we sketch out in general terms the framework for second or successive § 2255 motions. Under § 2255(h), a second or successive § 2255 motion must be certified by a panel of this Court to "contain" either newly discovered evidence or "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). We may authorize the filing of a second or successive § 2255 motion only if "the application makes a prima facie showing" that the application satisfies these requirements. *See* 28 U.S.C. § 2244(b)(2), (C). In Perez's case, we made this prima facie determination based on the new rule announced in *Johnson*, made retroactive by *Welch*.

This Court's prima facie determination is not binding on the district court, however. Instead, "the district court is to decide the [§ 2255(h)] issues fresh, or in the legal vernacular, *de novo*." *In re Moss*, 703 F.3d 1301, 1303 (11th Cir. 2013)

(quoting *Jordan v. Sec'y v. Dep't of Corr.*, 485 F.3d 1351, 1358 (11th Cir. 2007)). "Should the district court conclude that [the movant] has established the statutory requirements for filing a second or successive motion, it shall proceed to consider the merits of the motion, along with any defenses and arguments the respondent may raise." *Id.*

Our precedent therefore outlines a three-step process for obtaining relief based on a second or successive § 2255 motion. First, this Court must make a prima facie determination that § 2255(h)'s requirements are met. Second, once we have granted authorization, the district court must independently determine, based on a more developed record, that the movant has satisfied the requirements for filing a second or successive motion. And third, the district court must evaluate the merits of the motion, along with any defenses and arguments the respondent may raise, and determine that relief is warranted. In short, "[t]he movant must get through two gates"—ours and the district court's—"before the merits of the motion can be considered." *Bennett v. United States*, 119 F.3d 468, 470 (7th Cir. 1997).

Perez is correct that *Beeman*, which was decided on a first § 2255 motion, speaks to the final merits issue and not to the earlier gatekeeping issues. But we have held that the district court's determination at step two is itself an evaluation of the merits of the *Johnson* claim. *See Jackson v. United States*, 875 F.3d 1089, 1090 (11th Cir. 2017) ("The District Court's decision that Jackson's motion did not

satisfy § 2255(h)(2), therefore, is necessarily on the merits."). And any error at the district court's gate is harmless because Perez cannot, in any event, obtain relief on the merits under *Johnson*, for reasons we have explained above.[2] If he cannot obtain relief under *Johnson* in a first § 2255 motion, he fares no better in a second or successive § 2255 motion.

Perez's argument that once he passed the district court's gate he could prove his claim based on existing law, like *Descamps* and *Mathis*, is not consistent with *Beeman*. Those Supreme Court decisions, as well as ours applying them, including *United States v. Espirit*, 841 F.3d 1235, 1239–41 (11th Cir. 2016), and *Mays*, 817 F.3d at 733–34, are not relevant to the key inquiry for *Johnson* claims: whether, as a matter of historical fact, the movant "was sentenced as an armed career criminal under the residual clause." *Beeman*, 871 F.3d at 1224 n.5, 1225.

We recognize that Perez's sentence is unconstitutional, since when we account for *Descamps* and *Mathis*, Perez's sentence now exceeds the maximum authorized punishment for his offense. *See Espirit*, 841 F.3d at 1240–41 (holding, as a categorical matter, that prior convictions under Florida's burglary statute are not "violent felonies" under the ACCA). But under our binding precedent, a *Johnson* claim, absent a showing that the movant was sentenced under the residual

[2] Perez also argues that the district court failed to apply the "clear/unclear" test, as set out in *In re Rogers*, 825 F.3d 1335, 1339 (11th Cir. 2016). Any error was harmless, however, for the same reason as explained above.

clause, does not permit courts to assess whether the "defendant was incorrectly sentenced as an armed career criminal under the elements or enumerated offenses clause." *Beeman*, 871 F.3d at 1220. That is a "*Descamps* claim." *Id.* And movants cannot independently rely on *Descamps* (or *Mathis*) in a second or successive § 2255 motion. *See In re Hires*, 825 F.3d 1297, 1303 (11th Cir. 2016) ("*Descamps* is not retroactive for purposes of a second or successive § 2255 motion."); *Mays*, 817 F.3d at 734 (stating that "*Descamps* did not announce a new rule—its holding merely clarified existing precedent.").

Finally, Perez argues that *Beeman* was wrongly decided and that it conflicts with Supreme Court precedent. Regardless of our own views on the matter, however, we are bound by the panel's holding in *Beeman*.[3] *See United States v. Steele*, 147 F.3d 1316, 1317–18 (11th Cir. 1998) (*en banc*) ("Under our prior precedent rule, a panel cannot overrule a prior one's holding even though convinced it is wrong."). Perez's contention that *Beeman*'s holding contravenes prior Supreme Court precedent is similarly unavailing. *See United States v. Fritts*, 841 F.3d 937, 942 (11th Cir. 2016) ("Under this Court's prior panel precedent rule, there is never an exception carved out for overlooked or misinterpreted Supreme Court precedent.").

[3] Although the *Beeman* mandate has not issued, it is binding in this circuit. *Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992); 11th Cir. R. 36 (I.O.P. 2) ("Under the law of this circuit, published opinions are binding precedent. The issuance or non-issuance of the mandate does not affect this result.").

IV.

In sum, the district court did not err in finding that Perez failed to meet his burden under *Johnson* of showing that the sentencing court more likely than not relied on the residual clause when it found that his prior burglary convictions were violent felonies. Because Perez is not entitled to relief under *Johnson*, and he may not rely on *Descamps* and *Mathis*, we must affirm the denial of Perez's successive § 2255 motion.

AFFIRMED.