[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 20-11093

Non-Argument Calendar

JOSEPH FENELON COOPER,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket Nos. 3:17-cv-00178-RV-EMT;
3:97-cr-00068-RV-EMT-1

Before LUCK, LAGOA, AND BRASHER, Circuit Judges.

PER CURIAM:

This case is before us on remand from the United States Supreme Court for further consideration of Joseph Cooper's conviction under 18 U.S.C. section 924(c) in light of *United States v. Taylor*, 142 S. Ct. 2015 (2022). After consideration, we again affirm the district court's denial of Cooper's second section 2255 motion.

We laid out the facts of this case in our previous opinion. *See Cooper v. United States*, No. 20-11093, 2021 WL 2913068 (11th Cir. July 12, 2021). Relevant here, we granted Cooper permission to file a second section 2255 motion challenging his section 924(c) conviction on the grounds that attempted bank robbery wasn't a predicate crime of violence in light of *Johnson v. United States*, 576 U.S. 591 (2015). *Id.* at *2. The district court dismissed Cooper's motion because he failed to satisfy his burden under 28 U.S.C. section 2255(h) to show that it was "more likely than not that the residual clause, and only the residual clause, was the basis for the conviction." *Id.* "The district judge—who was the judge that sentenced Cooper—found that he relied exclusively on the elements clause of section 924(c)(3)." *Id.* We granted a certificate of appealability to address the following issue:

> Whether the district court erred in finding that Cooper failed to satisfy his burden under *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), to show

> that he was unconstitutionally sentenced under the residual clause of 18 U.S.C. section 924(c), when he was convicted of attempted armed bank robbery.

Id.

We affirmed. Applying the harmless-error standard set forth in *Granda v. United States*, 990 F.3d 1272, 1284 (11th Cir. 2021), we asked if there was any "grave doubt" whether Cooper suffered "actual prejudice" from any error committed by the district court, including any improper reliance on the residual clause. *Id.* at *3. We concluded that (1) "the district court found that it relied solely on the elements clause of section 924(c)(3) to determine that attempted bank robbery was a crime of violence"; (2) "the indictment support[ted] the conclusion that the district court relied on the elements clause because the indictment based the section 924(c) charge on attempted bank robbery under the first paragraph of section 2113(a)"; and (3) "the jury instructions reinforce[d] the conclusion that the district court relied on the elements clause in determining that Cooper's attempted bank robbery conviction was a crime of violence." *Id.* at *4.

Cooper filed a petition for certiorari in the United States Supreme Court. On June 27, 2022, the Supreme Court granted certiorari; vacated our judgment of July 12, 2021; and remanded the case for reconsideration in light of *Taylor*. *Cooper v. United States*, 142 S. Ct. 2859, 2859 (2022).

In *Taylor*, the Court held that attempted Hobbs Act robbery doesn't qualify as a "crime of violence" under section 924(c)(3)(A). 142 S. Ct. at 2020. Central to its holding, the Court applied a "categorical approach" to determine that attempted Hobbs Act robbery may not serve as a predicate for a conviction and sentence under the elements clause because it doesn't have "*as an element* the use, attempted use, or threatened use of physical force." *Id.* (citation omitted).

Whether attempted armed bank robbery may survive the Court's categorical approach to qualify as a predicate crime of violence under section 924(c)'s elements clause is an open question in light of *Taylor*. But whatever impact *Taylor* may have on our section 2255 jurisprudence going forward, it has no bearing on this case. This case is about Cooper's *Beeman* burden to show that he was unconstitutionally sentenced under the residual clause (and not the elements clause), "meaning he will have to show that his [section] 924(c) conviction[] resulted from application of solely the now-unconstitutional residual clause." *See Alvarado-Linares v. United States*, 44 F.4th 1334, 1341 (11th Cir. 2022) (brackets omitted) (quoting *In re Hammoud*, 931 F.3d 1032, 1041 (11th Cir. 2019)).

Determining whether a movant was sentenced solely under the residual clause is a question of "historical fact." *Beeman*, 871 F.3d at 1224 n.5. For example, "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.* Conversely, precedent issued after sentencing "casts very little light, if any, on the key question" of whether the movant was, in fact, sentenced under only the residual clause. *Id.* Nevertheless, where the record and evidence don't clearly explain what happened, the movant with the burden loses. *Id.* at 1225.

This takes us right back to where we were before certiorari. In our previous opinion, we concluded that the answer to *Beeman*'s question of historical fact in this case was no. "[T]he district court's findings, the indictment, and the jury instructions show that the district court relied on the elements clause." *Cooper*, 2021 WL 2913068, at *3. "Cooper cannot show that the district court relied on section 924(c)(3)'s residual clause," and the "record does not show a 'substantial likelihood' that the district court did not rely in whole or in part on the elements clause when sentencing Cooper." *Id.* at *5 (quoting *Granda*, 990 F.3d at 1288). Thus, the district court's order denying Cooper's second section 2255 motion must be affirmed.

AFFIRMED.