

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

January 29, 2020

Christopher M. Wolpert
Clerk of Court

In re: PAUL G. RAYFORD,

Movant.

No. 16-3191
(D.C. Nos. 2:11-CV-02477-CM & 2:09-
CR-20143-CM-2)
(D. Kan.)

ORDER

Before **HOLMES**, **MORITZ**, and **EID**, Circuit Judges.

Movant, Paul G. Rayford, seeks authorization to file a second or successive 28 U.S.C. § 2255 motion in the district court so he may challenge his conviction and sentence under 18 U.S.C. § 924(c). *See* 28 U.S.C. §§ 2255(h), 2244(b)(3). This matter is currently abated; we now lift the abatement.

In 2010, Movant was convicted of using or carrying a firearm during and in relation to a crime of violence under 18 U.S.C. § 924(c). He alleges that the underlying offense qualified as a “crime of violence” only as that term is defined in § 924(c)(3)’s residual clause. The Supreme Court invalidated this clause as unconstitutionally vague in *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019).

As an initial matter, it is unclear whether Movant needs authorization from this court before filing a § 2255 motion challenging his § 924(c) conviction. In 2012, we reversed the district court’s decision denying his first § 2255 motion and we remanded to the district court for further proceedings. In 2013, Movant was resentenced and the

district court entered an amended judgment. In light of the entry of an amended judgment between Movant's first § 2255 motion and this proposed § 2255 motion, the proposed § 2255 motion might not be second or successive. *See Magwood v. Patterson*, 561 U.S. 320, 341-42 (2010) (“[W]here . . . there is a new judgment intervening between the two [§ 2254] habeas petitions, an application challenging the resulting new judgment is not second or successive at all.” (citation and internal quotation marks omitted)); *United States v. McGaughy*, 670 F.3d 1149, 1159 & n.7 (10th Cir. 2012) (applying *Magwood* and holding that a second-in-time § 2255 motion challenging a re-sentencing was not second or successive). But *Magwood* expressly did not decide whether, after a prisoner obtains sentencing relief under § 2254 and a new judgment is entered, a subsequent habeas application challenging his *conviction* would be second or successive. *See* 561 U.S. at 342. We have not yet decided the issue reserved in *Magwood*, and we decline to do so in this matter. Accordingly, for purposes of this motion, we will assume without deciding that authorization is required for Movant to challenge his § 924(c) conviction.

To obtain authorization, Movant must make a *prima facie* showing that his second or successive § 2255 motion meets the gatekeeping requirements of § 2255(h). 28 U.S.C. § 2244(b)(3)(C); *see also United States v. Murphy*, 887 F.3d 1064, 1067 (10th Cir.), *cert. denied*, 139 S. Ct. 414 (2018). In assessing this showing, we do not consider the merits

of the second or successive motion.¹ See *In re Barrett*, 840 F.3d 1223, 1227 (10th Cir. 2016); *Ochoa v. Sirmons*, 485 F.3d 538, 544 (10th Cir. 2007) (per curiam). A motion may be authorized under § 2255(h)(2) if it relies on “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” *Davis* announced a new rule of constitutional law that the Court made retroactive to cases on collateral review through the combination of its holdings in *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016), and *Davis*. See *In re Mullins*, 942 F.3d 975, 979 (10th Cir. 2019).

Accordingly, to the extent authorization from this court is required, we grant Movant authorization to file a second or successive § 2255 motion in district court challenging his § 924(c) conviction and sentence under *Davis*. All pending motions are denied as moot.

Entered for the Court

A handwritten signature in black ink, appearing to read 'Chris Wolpert', with a long horizontal stroke extending to the right.

CHRISTOPHER M. WOLPERT, Clerk

¹ In limiting our consideration of this motion to the requirements of § 2255(h), we do not consider the existence or applicability of any plea-agreement waiver that may have been executed. We leave that and other merits considerations for the district court.