

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

December 31, 2019

Elisabeth A. Shumaker
Clerk of Court

In re: CARL LANEILL BROWN,

Movant.

No. 16-3199
(D.C. Nos. 5:01-CR-3058-RDR & 5:98-
CR-40034-RDR-1)
(D. Kan.)

ORDER

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

Movant, Carl Laneill Brown, 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.¹

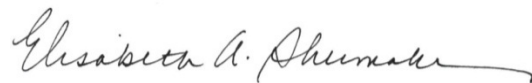
Movant was convicted of using or carrying a firearm during and in relation to a crime of violence or possessing a firearm in furtherance of a crime of violence under 18 U.S.C. § 924(c). He alleges that the underlying offense qualified as a “crime of violence” only as that term is defined in § 924(c)(3)’s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

¹ Movant filed a “Motion to Compel the Court for Ruling” on April 23, 2018, which the court construes as a motion to lift the abatement. Because the court is lifting the abatement sua sponte, this motion is denied as moot.

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.² *See In re Barrett*, 840 F.3d 1223, 1227 (10th Cir. 2018); *Ochoa v. Sirmons*, 485 F.3d 538, 544 (10th Cir. 2007). 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, we grant Movant authorization to file a second or successive § 2255 motion in district court challenging his § 924(c) conviction and sentence under *Davis*, as set forth in his supplemental motion for authorization filed on October 11, 2019. The court denies Movant’s motions to supplement dated May 9, 2017, and July 7, 2017.

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker".

ELISABETH A. SHUMAKER, Clerk

² 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.