

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

May 14, 2020

Christopher M. Wolpert
Clerk of Court

In re: KEVIN TOMMIE HALL,

Movant.

No. 16-3214
(D.C. Nos. 2:12-CV-02097-KHV &
2:06-CR-21062-KHV-1)
(D. Kan.)

ORDER

Before **TYMKOVICH**, Chief Judge, **BRISCOE** and **BACHARACH**, Circuit Judges.

Movant, Kevin Tommie Hall, proceeding pro se, 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), the enhancement of his sentence under the Armed Career Criminal Act, (ACCA), 18 U.S.C. § 924(e), and the enhancement of his sentence under the career offender sentencing guideline, U.S. Sentencing Guidelines Manual § 4B1.1 (U.S. Sentencing Comm’n 2008). *See* 28 U.S.C. §§ 2255(h), 2244(b)(3). This matter is currently abated; we now lift the abatement.

Movant was convicted under § 924(c) of using a firearm during and in relation to a crime of violence. He alleges his conviction is invalid because 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).

Movant was also convicted of a firearms offense in violation of 18 U.S.C. § 922(g). He alleges that his sentence for that offense was enhanced under the ACCA based on his having three qualifying prior convictions, *see* 18 U.S.C. § 924(e)(1), at least one of which was a violent felony. Movant alleges that the enhancement of his sentence under the ACCA is invalid because one or more of his prior offenses qualified as a “violent felony” only as that term was defined in the ACCA’s residual clause. The Supreme Court invalidated that provision as unconstitutionally vague in *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015). Similarly, Movant alleges that the enhancement of his sentence under the career offender guideline, which has an identically worded residual clause as that in the ACCA, is invalid under *Johnson*.

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.”

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.

We conclude that movant has made the required prima facie showing to challenge his § 924(c) conviction under *Davis*. The Supreme Court announced a new rule of constitutional law in *Davis* and the Court has made *Davis* 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).

We further conclude that movant has made the required prima facie showing to challenge the sentencing enhancement under the ACCA based on *Johnson*. The Supreme Court announced a new rule of constitutional law in *Johnson* and made it retroactive to cases on collateral review in *Welch*, 136 S. Ct. at 1265.

We finally conclude that movant has not made the required prima facie showing to challenge the sentencing enhancement under the career offender guideline based on *Johnson*, however. The requirements of § 2255(h)(2) are not satisfied by citing a new rule of law in the abstract. Rather, to receive authorization, the proposed successive § 2255 motion must rely on the new rule of law. See *Murphy*, 887 F.3d at 1067. In *Beckles v. United States*, 137 S. Ct. 886, 890 (2017), the Supreme Court rejected the argument that the career offender guideline's residual clause, like that in the ACCA, is void for vagueness under *Johnson*. The Court held that the advisory guidelines are not subject to vagueness challenges under the Due Process Clause. *Id.* Accordingly, movant's challenge to the enhancement of his sentence under the career offender guideline does not rely on *Johnson*. We therefore deny movant authorization to file a

second or successive § 2255 motion that includes a challenge to the enhancement of his sentence under the career offender guideline.²

Movant's motion for authorization is granted in part and denied in part. We grant Movant authorization to file a second or successive § 2255 motion in district court limited to challenges to his § 924(c) conviction and sentence and to the enhancement of his sentence under the ACCA. The denial of authorization "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

In the interest of justice, we direct the Clerk pursuant to 28 U.S.C. § 1631 to transfer the motion for authorization and supplements to the district court for the District of Kansas for filing as an authorized successive § 2255 motion. The filing date for the authorized § 2255 motion is June 22, 2016, the date the motion for authorization was placed in the prison mail system addressed to the court with postage prepaid and accompanied by a declaration by Movant under 28 U.S.C. § 1746. *See* Fed. R. App. P. 25(a)(2)(A)(iii).

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk

² Judge Bacharach does not join the denial of authorization for this claim. He would instead simply grant authorization to file a second or successive § 2255 motion that includes movant's challenge to his conviction under 18 U.S.C. § 924(c) or his ACCA sentencing enhancement based on *Davis and Johnson*. *See Nevius v. McDaniel*, 104 F.3d 1120, 1121 (9th Cir. 1996); *United States v. Winestock*, 340 F.3d 200, 205 (4th Cir. 2003), *abrogated in part on other grounds by United States v. McRae*, 793 F.3d 392 (4th Cir. 2015).