

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

December 6, 2019

Elisabeth A. Shumaker
Clerk of Court

In re: RICKY FACKRELL,

Movant.

No. 16-4101
(D.C. Nos. 2:06-CV-00055-TC &
2:04-CR-00816-TC-1)
(D. Utah)

ORDER

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

Movant, Ricky Fackrell, proceeding through counsel, 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.

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).

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. 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*.

Entered for the Court

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

ELISABETH A. SHUMAKER, 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.