

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

June 9, 2020

Christopher M. Wolpert
Clerk of Court

In re: BOBBY JOE HORN,

Movant.

No. 16-5142
(D.C. Nos. 4:05-CR-00152-JHP-1 & 4:13-
CV-00235-JHP-FHM)
(N.D. Okla.)

ORDER

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

Movant, Bobby Joe Horn, 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) and the enhancement of his sentence under the career offender sentencing guideline, U.S. Sentencing Guidelines Manual (“USSG”) § 4B1.1 (U.S. Sentencing Comm’n 2005). *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 that 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 also alleges that his enhanced sentence under the career offender guideline is invalid because one or more of his prior offenses qualified as a “crime of violence” only as that term was defined in the

then-existing residual clause of USSG § 4B1.2. The Supreme Court invalidated the identically worded residual clause of the definition of a “violent felony” in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B), as unconstitutionally vague in *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015).

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.”

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). Because Movant has made the required showing to obtain authorization under

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.

§ 2255(h) to file a second or successive § 2255 motion, we need not consider any other challenges he also seeks to raise.

Accordingly, we grant Movant authorization to file a second or successive § 2255 motion in district court. We deny without prejudice Movant's motion to file his successive § 2255 out of time. He may reassert that request in district court.

In the interest of justice, we direct the Clerk pursuant to 28 U.S.C. § 1631 to transfer the now-authorized successive § 2255 motion and supplements to the district court for the Northern District of Oklahoma. The filing date for the authorized § 2255 motion is September 14, 2016, the date the motion for authorization was filed in this court.²

Entered for the Court

A handwritten signature in black ink, appearing to read 'Christopher M. Wolpert', written over a horizontal line.

CHRISTOPHER M. WOLPERT, Clerk

² Our authorization to file the successive motion does not speak to the timeliness of the authorized § 2255 motion. Timeliness is a merits determination that is outside the scope of our gatekeeping inquiry under the relevant statutes. *See Ochoa*, 485 F.3d at 541-42 (merits assessment is outside scope of appellate court's gatekeeping role); *In re Rains*, 659 F.3d 1274, 1275 (10th Cir. 2011) (per curiam) (timeliness of habeas petition is a merits determination).