

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

February 25, 2020

Christopher M. Wolpert
Clerk of Court

In re: CONRAD VAZQUEZ SALAZAR,

Movant.

No. 20-2012
(D.C. Nos. 2:18-CV-00456-RB-JHR &
2:12-CR-03183-RB-1)
(D. N.M.)

ORDER

Before **HARTZ, KELLY**, and **HOLMES**, Circuit Judges.

Conrad Vazquez Salazar seeks authorization to file a second or successive 28 U.S.C. § 2255 motion. For the following reasons, we deny authorization.

In 2015, Mr. Vazquez Salazar entered a guilty plea to one count of conspiracy to commit arson, in violation of 18 U.S.C. § 844(n), and one count of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). He was sentenced to 240 months' imprisonment. In 2016, he filed his first § 2255 motion, arguing that his counsel was ineffective for failing to challenge a sentencing enhancement under the United States Sentencing Guidelines based on the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). The district court denied the § 2255 motion. Mr. Vazquez Salazar did not appeal from the denial. In 2018, he filed another § 2255 motion. The district court dismissed that motion for lack of jurisdiction as an unauthorized second or successive § 2255 motion.

Mr. Vazquez Salazar now seeks authorization to file a second or successive § 2255 motion based on the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019). In *Davis*, the Court held that the residual clause in the definition of "crime of violence" for convictions under 18 U.S.C. § 924(c) was unconstitutionally vague. *Id.* at 2324, 2336. We have held that *Davis* announced a new rule of constitutional law that the Court made retroactive to cases on collateral review. *See In re Mullins*, 942 F.3d 975, 979 (10th Cir. 2019) (per curiam).

To obtain this court's authorization, Mr. Vazquez Salazar must make a prima facie showing that his proposed successive § 2255 motion "contain[s] . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2); *see also United States v. Murphy*, 887 F.3d 1064, 1067 (10th Cir.) (applying the prima facie-showing requirement in 28 U.S.C. § 2244(b)(3)(C) to motions for authorization under § 2255(h)), *cert. denied*, 139 S. Ct. 414 (2018). A § 2255 motion "contains" a new rule of constitutional law if it "relies on" the new rule. *Murphy*, 887 F.3d at 1067 (internal quotation marks omitted). But the requirements are not satisfied by the mere citation of a new rule of constitutional law in the abstract. Instead, the new rule of law must actually be the basis of the challenge for which authorization is sought. *See In re Encinias*, 821 F.3d 1224, 1225 & n.2 (10th Cir. 2016) (per curiam).

Mr. Vazquez Salazar contends that he can make a prima facie showing "due to the *Davis* case, and due to the fact that his conviction under 18 USC 844(i) and (n) no longer qualifies as a crime of violence and predicate for companion offenses under 18 USC

924(c) and (j).” Mot. for Auth. at 3. Mr. Vazquez Salazar, however, was not convicted of violating § 924(c) or (j) and therefore his § 844 conviction was not used as a predicate crime of violence.¹ Because he was not convicted of violating § 924(c), he does not make a prima facie showing that his proposed successive § 2255 motion relies on the new rule of constitutional law announced in *Davis*.

Accordingly, we deny authorization. This 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).

Entered for the Court

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

CHRISTOPHER M. WOLPERT, Clerk

¹ Mr. Vazquez Salazar alleges that the government threatened to file a superseding indictment to add a § 924(c) charge to coerce him into pleading guilty and accepting a higher stipulated sentence. He also notes that his co-defendant, Clifford Salas, who was charged with and convicted of violating § 924(c), has now had his conviction overturned based on *Davis*. But the government’s alleged threat to charge him with a § 924(c) conviction and his co-defendant’s ability to obtain relief from his 924(c) conviction does not change the fact that Mr. Vazquez Salazar himself was not charged with or convicted of violating § 924(c).