

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

August 21, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TRACY MORGAN,

Defendant - Appellant.

No. 17-1172
(D.C. Nos. 1:15-CV-01480-REB &
1:11-CR-00303-REB-1)
(D. Colorado)

ORDER AND JUDGMENT*

Before **McHUGH**, **MURPHY**, and **CARSON**, Circuit Judges.

Tracy Morgan was found guilty of four counts of kidnapping in violation of 18 U.S.C. § 1201(a)(1), one count of conspiracy to kidnap in violation of 18 U.S.C. § 1201(c), and possession of a firearm during a crime of violence in violation of 18 U.S.C. § 924(c). In July 2015, Mr. Morgan filed a pro se post-conviction motion under 28 U.S.C. § 2255 challenging these convictions. After the Supreme Court invalidated the Armed Career Criminal Act's residual clause in *Johnson v. United States*, 135 S. Ct.

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule Appellate Procedure 32.1 and 10th Circuit Rule 32.1.

2551, 2563 (2015), Mr. Morgan was appointed counsel, who sought to add a challenge to Mr. Morgan’s § 924(c) conviction. In June 2016, appointed counsel filed a motion to amend the petition to add a claim that Mr. Morgan was convicted under § 924(c)(3)’s residual clause—a clause Mr. Morgan contended was unconstitutionally vague after *Johnson*.

The parties agreed Mr. Morgan’s original motion was timely under 28 U.S.C. § 2255(f)(1). But the government challenged Mr. Morgan’s motion to amend because it was not filed within one year of his conviction becoming final, so it could not be timely under § 2255(f)(1). The government further argued that *Johnson* did not recognize a right related to § 924(c), and therefore could not be timely under § 2255(f)(3). The district court agreed and denied as futile Mr. Morgan’s motion to amend because he was not asserting the right newly recognized in *Johnson* and therefore his claim would fail as untimely. This court granted a certificate of appealability on the timeliness and substance of Mr. Morgan’s challenge to his § 924(c) conviction.

We review the district court’s denial of a motion to amend for abuse of discretion. *Peterson v. Grisham*, 594 F.3d 723, 731 (10th Cir. 2010). When a district court denies a motion to amend as futile, our abuse of discretion review “includes de novo review of the legal basis for the finding of futility.” *Id.* (quotation marks omitted).

Here, we need not evaluate the timeliness of Mr. Morgan’s amended § 2255 motion. While this appeal was pending, the Supreme Court decided *United States v. Davis*, in which it held the residual clause in § 924(c)(3) was unconstitutionally vague. 139 S. Ct. 2319, 2336 (2019). Although the government continues to maintain that

Mr. Morgan's challenge is untimely, it also recognizes that Mr. Morgan's conviction could be sustained only under § 924(c)(3)'s now-invalid residual clause. In light of this development, the government has chosen to waive its timeliness objection to Mr. Morgan's § 2255 motion.¹

Based on the government's waiver of timeliness, we conclude Mr. Morgan's challenge to his § 924(c) conviction is not futile. Instead, the government has conceded Mr. Morgan's underlying challenge is meritorious. As a result, we REVERSE the district court's denial of Mr. Morgan's motion to amend and REMAND to the district court for further proceedings consistent with this order.²

The clerk is directed to issue the mandate forthwith.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

¹ If the government expressly waives the statute of limitations defense, it would be an abuse of discretion for our court to consider timeliness. *See Wood v. Milyard*, 566 U.S. 463, 466 (2012) ("A court is not at liberty, as we have cautioned, to bypass, override, or excuse a State's deliberate waiver of a limitations defense."); *United States v. Muly*, 725 F. App'x 639, 643 (10th Cir. 2018) (recognizing the rule in *Wood* applies to the government's waiver of timeliness of a § 2255 motion).

² We also GRANT Mr. Morgan's motion to proceed *in forma pauperis*.