United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
February 25, 2021
Lyle W. Cayce
Clerk

No. 19-51045

IN RE: TRAVIS JAMES HARRIS,

Movant.

Motion for an order authorizing
the United States District Court for the
Western District of Texas to consider
a successive 28 U.S.C. § 2255 motion

Before HIGGINBOTHAM, SMITH, and OLDHAM, *Circuit Judges*.

PER CURIAM:

Travis James Harris, federal prisoner # 22048-180, seeks authorization to file a successive 28 U.S.C. § 2255 motion challenging his conviction and sentence under 18 U.S.C. § 924(c)(1)(A) for using and possessing a destructive device during and in relation to a crime of violence. He intends to argue that his conviction should be vacated because the predicate offense for his conviction, arson in violation of 18 U.S.C. § 844(i), qualified as a "crime of violence" only under the residual clause in § 924(c)(3)(B), which pursuant to *United States v. Davis*, 139 S. Ct. 2319, 2325–26, 2336 (2019), is unconstitutionally vague.

We will authorize the filing of a successive § 2255 motion only if the movant makes a prima facie showing that his claims rely on either "newly discovered evidence that . . . would be sufficient to establish by clear and

convincing evidence that no reasonable factfinder would have found the movant guilty," or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." § 2255(h); *see also* 28 U.S.C. § 2244(b)(3)(C); *In re Dockery*, 869 F.3d 356, 356 (5th Cir. 2017) (mem). We conclude that Harris has made "a sufficient showing of possible merit to warrant a fuller exploration by the district court." *In re Morris*, 328 F.3d 739, 740 (5th Cir. 2003) (quotation omitted).

Accordingly, IT IS ORDERED that Harris's motion for authorization to file a successive § 2255 motion is GRANTED. Our grant of authorization based on the prima facie showing required at this stage is tentative, however, in that the district court must dismiss the motion without reaching its merits if the court determines that Harris has failed to satisfy the requirements of § 2255(h). *See In re Morris*, 328 F.3d at 741. We express no view on what decisions the district court should make. The Clerk is DIRECTED to transfer the motion for authorization and related pleadings to the district court for filing as a § 2255 motion. *See Dornbusch v. Comm'r*, 860 F.2d 611, 612-15 (5th Cir. 1988). The filing date shall be, at the latest, the date the motion for authorization was filed in this court, unless the district court determines that an earlier filing date should apply. *See Spotville v. Cain*, 149 F.3d 374, 376 (5th Cir. 1998).

ANDREW S. OLDHAM, *Circuit Judge*, concurring.

The Supreme Court has held that new rules of constitutional law are "not 'made retroactive to cases on collateral review'" under 28 U.S.C. § 2255(h)(2) "unless the Supreme Court holds [them] to be retroactive." *Tyler v. Cain*, 533 U.S. 656, 663 (2001).[*] But there appears to be some tension between *Tyler*'s reasoning and *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016). And the federal Government has repeatedly refused to litigate the issue. *See, e.g.*, *In re Hall*, 979 F.3d 339, 342 & n.1 (5th Cir. 2020). So I reluctantly concur in the tentative authorization here.

To obtain authorization to file a successive § 2255 motion, Harris must show that his underlying claim relies "on 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). The first question then is whether *Davis* announced a new rule of constitutional law. Our court answered that question in the affirmative in *United States v. Reece*, 938 F.3d 630, 635 (5th Cir. 2019). There, we held that *Davis* announced a substantive rule of constitutional law because it invalidated the residual clause of § 924(c) and "narrow[ed] the scope of conduct for which punishment is now available." *United States v. Reece*, 938 F.3d 630, 635 (5th Cir. 2019). We thus determined that "*Davis* announced a new rule of constitutional law retroactively applicable on a *first [§ 2255 motion].*" *Ibid.* (emphasis added).

But *Reece* does not squarely govern second or successive motions under § 2255(h). That's because the standard enunciated in that subsection

[*] In *Tyler*, the Supreme Court addressed a state prisoner's § 2244(b)(2)(A) motion. But the retroactivity language in that provision is materially identical to the language in § 2255(h)(2), which applies to federal prisoners.

is different from (and arguably more stringent than) the § 2255(f)(3) standard confronted in *Reece*. Initial habeas petitions under § 2255(f)(3) simply require (1) recognition of a new rule of constitutional law by the Supreme Court; and (2) that the right be made retroactively applicable to cases on collateral review. Section 2255(h)(2) by contrast requires that "*the Supreme Court*" has made the new rule retroactive. And we presume that Congress intended the different phraseology to carry different meanings. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (emphasizing "the usual rule that 'when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended'" (quoting 2A N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:06, at 194 (6th rev. ed. 2000))).

So what does § 2255(h)(2) mean? In *Tyler v. Cain*, the Supreme Court explained two ways that it can make a new rule of constitutional law retroactive under 2255(h)(2). First, the Supreme Court itself can expressly hold that a new rule is retroactive on collateral review. *Tyler*, 533 U.S. at 662–64. Or second, the Supreme Court's holdings in "[m]ultiple cases" can "render a rule retroactive," but "only if the holdings of those cases necessarily dictate retroactivity of the new rule." *Id.* at 666. We cannot infer that the Supreme Court has made something retroactive "when it merely establishes principles of retroactivity and leaves application of those principles to lower courts." *Id.* at 663.

It's undisputed that the Supreme Court has not expressly made *Davis* retroactive. In *Davis* itself, four Justices indicated that it would take a future ruling to determine whether *Davis* applied retroactively. *See* 139 S. Ct. at 2354 (Kavanaugh, J., dissenting) ("[W]ho knows whether the ruling [in *Davis*] will be retroactive."). So *Davis* can be retroactive under § 2255(h)(2) only if the holdings of multiple supreme court cases "necessarily dictate retroactivity." *Tyler*, 533 U.S. at 666.

What are those multiple cases? It's not entirely clear. The parties point to *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), for example. But it's not obvious why *Teague* would apply here, given that it turned on principles of finality and comity that apply to *state* judgments. *See Welch*, 136 S. Ct. at 1264 (assuming without deciding that *Teague* applies to federal prisoners); *cf. United States v. Hayman*, 342 U.S. 205, 210–19 (1952) (distinguishing federal prisoners' motions under § 2255 from state prisoners' habeas petitions); *Beras v. Johnson*, 978 F.3d 246, 250 (5th Cir. 2020) (per curiam) (same); *id.* at 255–56 (Oldham, J., concurring) (same). It could be argued, I suppose, that Congress added the phrase "made retroactive[]" to § 2255(f)(3) and § 2255(h)(2) in AEDPA—seven years after *Teague*—and hence incorporated *Teague* into those statutory provisions. *Cf. Cannon v. Univ. of Chicago*, 441 U.S. 677, 697–98 (1979). But I think we'd be well-served to consider all the arguments for and against applying *Teague* to federal judgments, rather than continuing to assume that it applies.

The parties also point to *Welch*. But that case concerned the retroactivity of *Johnson v. United States*, 576 U.S. 591 (2015)—not *Davis*. The statutory provisions in *Johnson* and *Davis* are similar, sure. But it seems odd that we're all just assuming the Supreme Court would want us to extend *Johnson* and *Welch* to a new statute. That's not the level of rigor that usually accompanies statutory interpretation, constitutional adjudication, or retroactivity doctrine. It's also not the way inferior courts usually interpret Supreme Court precedent. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 237–38 (1997). And it's particularly odd to do it when Congress tasked the Supreme Court—and only the Supreme Court—with extending its precedent. *See* 28 U.S.C. § 2255(h)(2).

If it were up to me, I'd wait until the Supreme Court itself made *Davis* retroactive, as § 2255(h)(2) requires. But at this point, we have numerous Fifth Circuit panels that have authorized successive motions under

§ 2255(h)(2) to raise *Davis* claims. And as far as I can tell, the Government has contested none of them.