Appendix F

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE: SEBASTIAN ECCLESTON,	)	CASE NO. 16-2126 & 16-2130
	)	
Movant	)	**MOTION TO LIFT ABATEMENT**
	)	

Movant Sebastian Eccleston, through counsel, respectfully moves the Court to lift the abatement of this matter and grant his motion for permission to file a second or successive post-conviction motion. In support of this Motion, counsel states:

Mr. Eccleston is a federal prisoner who is incarcerated on convictions for carjacking, robbery or conspiracy to rob in violation of 18 U.S.C. § 1951(a), and two counts of using a firearm during a crime of violence in violation of 18 U.S.C. § 924(c). On May 2, 2016, Mr. Eccleston moved this Court for permission to file a second or successive post-conviction motion pursuant to 28 U.S.C. § 2255(h)(2). Mr. Eccleston sought permission to litigate in the district court a claim that his § 924(c) convictions were based on that statute's residual clause and are, thus, invalid under *Johnson v. United States*, 135 S. Ct. 2551 (2015). *See generally United States v. Salas*, 889 F.3d 681 (10th Cir. 2018) (recognizing that *Johnson* invalidates § 924(c)'s residual clause). On June 24, 2016, this Court *sua sponte* abated Mr. Eccleston's motion. Mr. Eccleston now asks the Court to lift the abatement and grant him permission to file a second or successive post-conviction.

Five reasons support lifting the abatement.

First, 28 U.S.C. § 2244(b)(3)(D) specifies that a "court of appeals shall grant or deny the authorization to file a second or successive [post-conviction] application not later than 30 days after the filing of the motion." Mr. Eccleston's motion has now been pending for more than two years. While this Court has held that § 2244(b)(3)(D) is "hortatory and advisory rather than mandatory," and does not affect this Court's jurisdiction, *Browning v. United States*, 241 F.3d 1262, 1263–64 (10th Cir. 2001), Congress's declaration that these matters should be expedited should nevertheless be given some effect. Although this case may present a "more complex situation for which th[e] [30-day] limit is not practical," *Browning*, 241 F.3d at 1264, this case is not so complicated that two years is insufficient time. Thus, the Court should heed the exhortation and advice of § 2244(b)(3)(D) and resolve this matter without further delay.

Second, it is clear that Mr. Eccleston is entitled to a grant of authorization. Under § 2255(h)(2), a second or successive post-conviction motion must "contain . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." A post-conviction motion "contain[s]" a new rule of constitutional law if it is "based upon" or "rel[ies] on" the new rule cited by the movant. *See In re Encinias*, 821 F.3d 1224 (10th Cir. 2016). In order to secure permission to file such a motion, the movant need only make a prima facie showing that the motion would meet the standards of § 2255(h)(2).

Here, there is a prima facie case that Mr. Eccleston's proposed motion is based upon or relies on a new and previously unavailable rule of constitutional rule. His claim that § 924(c)(3)(B) is unconstitutional depends on the new rule that statutes which

combine the categorical approach with an indefinite risk standard are unconstitutionally vague. *See Sessions v. Dimaya*, 138 S. Ct. 1204 (2018); *Johnson v. United States*, 135 S. Ct. 2551 (2015). The Supreme Court made that rule retroactive in *Welch v. United States*, 136 S. Ct. 1257 (2016). While the Government may try to convince the district court that Mr. Eccleston's motion *ultimately* does not satisfy § 2255(h)(2), the foregoing clearly provides a *prima facie case* that Mr. Eccleston's motion does satisfy § 2255(h)(2).

Third, and relatedly, it is unclear what purpose continuing the abatement of this case serves. This Court did not specify what it is/was waiting on when it abated this matter. Absent a compelling purpose for further delay, Mr. Eccleston is entitled to have this matter decided.

Fourth, although the merits are not a factor in deciding whether to grant permission to file a second or successive post-conviction motion, *Case v. Hatch*, 731 F.3d 1015 (10th Cir. 2013), Mr. Eccleston has a strong case on the merits that deserves to proceed without further delay. To succeed in the district court, Mr. Eccleston will need to show that his § 924(c) conviction was predicated on the unconstitutional residual clause, rather than on the still-valid force clause. At least with respect to the § 924(c) conviction predicated on § 1951(a) robbery/conspiracy, he can do so. While a *completed* § 1951(a) robbery is a crime of violence under the force clause, *United States v. Melgar-Cabrera*, 892 F.3d 1053 (10th Cir. 2018), *conspiracy* to commit § 1951(a) robbery is not. *Velleff v. United States*, ___ F. Supp. 3d ___, 2018 WL 1900491, *4 (N.D. Ill. Apr. 20, 2018) ("[N]umerous courts have explicitly rejected the argument that Hobbs Act conspiracy satisfies the force clause's definition of a crime of violence."). Here, unlike in most

§ 1951(a) cases, the indictment to which Mr. Eccleston pleaded guilty charged *both* theories—completed robbery and conspiracy to rob—in the § 1951(a) count that underlay the § 924(c) conviction. *See* Exs. A & B. And, of course, an indictment that charges "and" actually means "or." *See, e.g., United States v. Silva*, 889 F.3d 704, 716–17 (10th Cir. 2018). Thus, the charge underlying Mr. Eccleston's § 924(c) conviction was that he *either* robbed *or* conspired to rob. Because the records in this case do not establish whether Mr. Eccleston was convicted of completed robbery (which is a crime of violence under the force clause) or conspiracy to rob (which is not), the "demand for certainty" that his offense is one that would support a § 924(c) conviction after *Johnson* has not been satisfied. *United States v. Titties*, 852 F.3d 1257, 1268 (10th Cir. 2017).

At a minimum, Mr. Eccleston has a strong case that only the unconstitutional residual clause sustains his § 924(c) conviction. Although the merits are not a proper factor in deciding whether to grant authorization, the strength of Mr. Eccleston's case on the merits counsels against further delay in deciding whether he can proceed. For this reason as well, the Court should lift the abatement

Fifth, and finally, Mr. Eccleston is being prejudiced by the delay. The § 924(c) conviction that stemmed from the § 1951(a) robbery/conspiracy offense added 240 months to Mr. Eccleston's sentence. By undersigned counsel's estimation, but for that conviction, Mr. Eccleston would now be eligible for release.

For these reasons, Mr. Eccleston respectfully requests that this Court lift the abatement and grant his motion for leave to file a second or successive post-conviction motion to challenge his § 924(c) conviction.

Respectfully submitted,

VIRGINIA L. GRADY
Federal Public Defender

/s/ Josh Lee
JOSH LEE
Assistant Federal Public Defender
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002
josh.lee@fd.org
Counsel for Defendant-Appellant

CERTIFICATIONS

I hereby certify that the following is true and correct to the best of my knowledge and belief, formed after a reasonable inquiry:

(1) This motion is proportionally spaced and contains 1095 words and therefore complies with the applicable type-volume limitations.

(2) Any required privacy redactions have been made.

(3) If required to file additional hard copies, the ECF submission is, with the exception of any redactions, an exact copy of those hard copies.

(4) The ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program Symantec AntiVirus Corporate Edition, which is continuously updated, and, according to the program is free of viruses.

(5) On July 16, 2018, I electronically filed the foregoing using the CM/ECF system, which will send notification of this filing to opposing counsel, *viz.*: Jack Burkhead, jack.e.burkhead@usdoj.gov.

(6) I sent a copy of the foregoing, via U.S. Mail, to Sebastian Eccleston

/s/ Josh Lee
JOSH LEE
Assistant Federal Public Defender