No._____

IN THE SUPREME COURT OF THE UNITED STATES

GERARDO CASTILLO-CHAVEZ, PETITIONER

V.

UNITED STATES OF AMERICA

_____

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

_____

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a district court is authorized to dismiss a successive § 2255 motion for lack of jurisdiction after a court of appeals has authorized the filing of the motion.

2. Whether, to prevail on a successive § 2255 motion, a defendant must, pursuant to 28 U.S.C. § 2244(b)(4), prove by a preponderance of the evidence that his conviction was in violation of a new, retroactive constitutional ruling or does he meet § 2244(b) standard by a showing that his conviction could have so rested.

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Gerardo Castillo asks that a writ of certiorari issue to review the order and judgment entered by the United States Court of Appeals for the Fifth Circuit on February 7, 2022.

PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the courts below.

OPINION BELOW

The unpublished order of the court of appeals denying Castillo a certificate of appealability is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The order and judgment of the court of appeals were entered on February 7, 2022. This petition is filed within 90 days after entry of judgment. *See* Supreme Court Rule 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1); *Hohn v. United States,* 524 U.S. 236 (1998).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part that "No person shall . . . be deprived of life, liberty, or property without due process of law[.]"

The Sixth Amendment to the United States Constitution provides in pertinent part that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]"

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. § 2244(b)provides, in pertinent part:

(b)

(3)

(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

Title 28 U.S.C. § 2255 provides:

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

. . .

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

STATEMENT

This petition presents two interrelated issues. The first is whether a district court is authorized to dismiss for lack of jurisdiction a second or subsequent § 2255 motion under § 2244(b)(4) after a court of appeals has authorized the filing of the motion. Castillo contends that the district court is not so authorized because the better reading of § 2255(h) and § 2244(b) is that authorization from the court of appeals is the only jurisdictional prerequisite the statutes set out for federal motions to vacate sentence. The second is, assuming a district court has such power, whether a defendant, to avoid dismissal by the district court, must prove by a preponderance of the evidence that his claim rests on a newly announced, retroactive constitutional rule or whether he must merely show that his conviction and sentence

In 2012, a jury found Castillo guilty of five charges.: a drug conspiracy, two Travel Act violations (Counts 28 and 33) under 18 U.S.C. § 1952(a)(2)(B), and two counts of possessing and discharging a firearm in connection with a crime of violence (Counts 29 and 34) under 18 U.S.C. § 924(c)(1)(C). The predicate crimes for both the § 924(c) counts were alleged to be both the drug conspiracy and a Travel Act violation. Appendix C.

At sentencing, the district court vacated the Count 29 § 924(c) conviction, ruling that it was impossible to state that the verdicts on Counts 29 and 24 were not based on the same facts. EROA.5592-97. The prosecutor specifically asked the Court to retain the verdict on Count 34, rather than on Count 29, stating that "I think *it's a stronger conviction for purposes of appeal, and we're talking about the second ITAR [Travel Act] and the second 924(c).*" EROA.5593-94. Castillo was sentenced to life imprisonment on Count 1, and a consecutive 40-year sentence on the § 924(c) charge on Count 34. Appendix C. Castillo's convictions and sentences were affirmed on appeal. *United States v. Castillo-Chavez,* 555 Fed. Appx. 389 (5th Cir. 2014).

In 2015, Castillo filed a timely motion to vacate sentence under 28 U.S.C. § 2255 that raised three grounds of ineffective assistance of counsel. The district court denied the motion. In 2016, the district court dismissed a second § 2255 motion from Castillo as unauthorized and successive.

After the Court held the residual clause of 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague in *United States v. Davis,* 139 S. Ct. 2319 (2019), Castillo sought leave from the Fifth Circuit to file a successive § 2255 motion. He asserted that he was entitled to relief under *Davis* because the jury verdict on Count 34 rested on the definition of "crime of violence" in the residual clause of § 924(c)(3)(B). The Fifth Circuit granted authorization to file the motion. The order also stated that "This grant of authorization is tentative in that the district court *must dismiss the § 2255 motion without reaching the merits if it determines that Castillo has failed to make a showing required to file such a motion.*" Appendix D.

The district court appointed counsel and called for briefing. Castillo argued that, because the Travel Act allegation of Count 33 did not allege an elements-based crime of violence, his conviction on Count 34 was invalid under *Davis.* The district court ruled that Castillo had not shown by a preponderance of the evidence that his conviction and sentence rested on the residual clause of § 924(c)(3)(B). It therefore dismissed the case on jurisdictional grounds under § 2244 without reaching the merits of the motion. Appendix B. Castillo sought a certificate of appealability from the Fifth Circuit on the jurisdictional issue and on whether he had shown constitutional error under *Davis*. The court of appeals declined to grant it. Appendix A.

REASONS FOR GRANTING THE WRIT

The Court invalidated the residual clause of 18 U.S.C. § 924(c)(3)(B) in *United States v. Davis,* ruling that the statute was void for vagueness. 139 S. Ct. at 2236. After *Davis,* petitioner Castillo sought authorization from U.S. Court of Appeals for the Fifth Circuit to file a successive motion to vacate sentence under 28 U.S.C. § 2255. He asserted that *Davis* meant his § 924(c) conviction for possessing and discharging a firearm in furtherance of a crime of violence could not stand.

The Fifth Circuit granted authorization, but, consistent with its precedent, interpreting the interaction of 28 U.S.C. § 2255 with 28 U.S.C. § 2244, stated that the authorization was tentative and subject to review by the district court. The district court conducted that review and dismissed Castillo's motion without reaching its merits because it concluded Castillo had not shown by a preponderance of the evidence that his claim for relief relied on the rule announced in *Davis* and thus that his motion failed to clear the jurisdictional tests of § 2255 and § 2244(b)(3)-(4).

The courts of appeals are divided as to whether the gatekeeping authorization set out in § 2255 allows tentative jurisdictional authorizations that may be rescinded by the district court. The circuits that permit such tentative authorizations are divided as to what standard the district court rescinding a tentative authorization should apply. Because these splits affect whether and how a defendant may challenge a conviction rendered unconstitutional because of a new, retroactive rule from the Court, resolution of them is needed.

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE SPLIT BETWEEN THE CIRCUITS AS TO WHETHER THE AUTHORIZATION OF A SUCCESSIVE 2255 MOTION BY A COURT OF APPEALS IS THE ONLY JURISDICTIONAL REQUIREMENT IMPOSED BY SECTIONS 2255 AND 2244.

Section 2255 provides a remedy where "the sentence was imposed in violation of the Constitution or laws of the United States" or where "the sentence was in excess of the maximum authorized by law." 28 U.S.C. § 2255(a). A person convicted of a federal criminal offense is generally limited to one post-conviction motion to vacate sentence. 28 U.S.C. § 2255. Thus, the denial of a defendant's § 2255 motion usually ends the case. However, the statute allows a "second or successive" petition when a new rule of constitutional law made retroactive by this Court has been announced, and the court of appeals has certified, as provided in section 2244, that the motion "contain[s] a claim based on that new, retroactive rule. 28 U.S.C. § 2255(h); 28 U.S.C. § 2244.

Section 2255(h) appears to set a single certification standard. It requires authorization from the court of appeals in the manner set out in § 2244. Section 2244 sets out the authorization process in subsections 2244(b)(3)(A)-(E). All of the references to authorization in § 2244(b)(3)(A)-(E), refer to actions by the court of appeals.

However, § 2244 is primarily concerned with the filing of successive federal habeas petitions by state prisoners under 28 U.S.C. § 2254 and sets out procedures beyond authorization. These other subsections of § 2244 have created disputes about

exactly what parts of § 2244 are incorporated by § 2255(h) and have divided the circuits.

The Sixth Circuit has held that § 2255(h) incorporates only the authorization process of § 2244(b)(3). Under this interpretation of § 2255(h), the single gatekeeping hurdle a federal defendant must satisfy is obtaining an authorization from the court of appeals. Once that authorization has been obtained, the certification process is complete, and the successive § 2255 motion is to be considered on its merits by the district court. *Williams v. United States*, 927 F.3d 427, 434-39 (6th Cir. 2019).

The Sixth Circuit's ruling reflected its conclusion that "§ 2255(h)'s reference to § 2244's certification requirement is much more sensibly read as referring to the portions of § 2244 that actually concern the certification procedures[,]" as opposed to the entirety of § 2244. Thus, § 2255(h) incorporated § 2244(b)(3), which "provide[d]" for how such a "motion [is to] be certified"). *Williams,* 927 F.3d at 435. That was the only gatekeeping mechanism provided by the statutes for motions to vacate under § 2255. 927 F.3d at 435-38. There is no tentative authorization, and no authority for the district court to review the procedural step of issuing the § 2244(b)(3) certification. *Id.*

Several circuits, including the Fifth Circuit, disagree. They hold that § 2244 sets out two jurisdictional tests that a defendant must pass to have his § 2255 successive motion heard on the merits. The first is that § 2255(h) requires a movant to make a prima facie showing to the court of appeals that satisfies § 2244(b)(3). If

that is done, then permission has been obtained to file a successive motion. *United States v. Clay,* 921 F.3d 550, 554 (5th Cir. 2019); *see also Reyes-Requena v. United States,* 243 F.3d 893, 897-98 (5th Cir. 2001). The second is that "after receiving permission from the circuit court" the movant "must actually prove at the district court level that the relief he seeks relies either on a new, retroactive rule of constitutional law or on new evidence." *Clay,* 921 F.3d at 554 (quoting *United States v. Wiese,* 896 F.3d 720, 723 (5th Cir. 2018) and citing 22 U.S.C. § 2244(b)). If a movant fails to meet both these gatekeeping tests, the district court lacks jurisdiction to consider the motion and must dismiss it. *Clay,* 921 F.3d at 558-59. The Fifth Circuit Court has followed this rule consistently over time, *see, e.g., In re Hoffner*, 870 F.3d 301, 307 (3d Cir. 2017), and rigorously enforces it, such that even when a district court has reached the merits of a successive § 2255 motion, the Fifth Circuit has, rather than reviewing the merits, dismissed the case for failure, in its view, to pass through the second gate. *United States* v. *Wiese*, 896 F.3d 720, 721-23 (5th Cir. 2018).

The view espoused by the Fifth Circuit is the majority view, adhered to by, among others, the Seventh, Eighth, Ninth, Tenth, Eleventh circuits. *See Bennett v. United States,* 119 F.3d 468, 469 (7th Cir. 1997); *Walker v. United States*, 900 F.3d 1012, 1014–15 (8th Cir. 2018); *United States v. Villa-Gonzalez,* 208 F.3d 1160, 1164 (9th Cir. 2000); *United States* v. *Washington*, 890 F.3d 891, 895 (10th Cir. 2018); *In re Moss*, 703 F.3d 1301, 1303 (11th Cir. 2013). This majority view, however, seems at odds with both the plain language and structure of § 2255 and § 2244 and the purposes behind limiting second or successive petitions.

As the Sixth Circuit pointed out in *Williams,* the language of § 2255(h)'s opening phrase is the only clear jurisdictional language in the statute. 927 F.3d at 437-38. That language merely requires a movant to obtain authorization from the court of appeals. *Id.* Once authorization is granted, jurisdiction exists, even if the authorization was arguably done in error. *Id.* Nothing in § 2244(b)(3) or § 2244(b)(4), even assuming that § 2244(b)(4) applies to federal movants, constitutes a clear indication of a jurisdictional hurdle beyond authorization. *Id.* (citing *Gonzalez v. Thaler,* 565 U.S. 134, 141, (2012)).

The Sixth Circuit's ruling follows this Court's teaching that plain language is the beginning and ending point of statutory interpretation when what Congress has done is clear. *See, e.g., United States v. Ron Pair Enterprises,* 489 F.3d 289, 241 (1989). The only requirement Congress set for avoiding the bar on successive § 2255 appears to be the must-be-certified language of the opening phrase of § 2255(h). That requirement is met by the issuance of an authorization under § 2244(b)(3). The structure of the statutes also supports this as the better reading of § 2255(h) and § 2244(b). As the Court has taught "when deciding whether the language is plain, we must read the words `in their context and with a view to their place in the overall statutory scheme.'" *King v. Burwell,* 576 U.S. 473, 486 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000). It simply runs counter to the statute and the typical understanding of jurisdiction to require a successive motion defendant to be required to prove jurisdiction over and over. *Cf. Gonzalez,* 565 U.S. at 163 ("it would be passing strange if [after initial jurisdictional authorization]" court

was "dutybound to revisit the threshold showing and gauge its "`substantial[ity]`" to verify its jurisdiction).

It also makes little sense to read § 2255(h) as incorporating§ 2244(b)(4) because to read it that way means that § 2244(b)(2) must also be incorporated. This is because § 2244(b)(4) requires a claim to satisfy "the requirements of this section." This section includes § 2244(b)(2), which requires a § 2254 petitioner to show the district court that his claim "relies on" a new, retroactive constitutional rule. Section 2255(h) requires only that a successive motion "contain[ ]" a claim based on a new, retroactive constitutional rule. Reading § 2244(b)(4) as applying to federal movants essentially reads the word "contains" out of § 2255(h) and replaces it with the "relies on" standard of § 2244(b)(2). Such as reading violates both the plain-language canon and the rule that courts should give effect to all relevant statutory language. *Cf. Hawaii v. Office of Hawaiian Affairs,* 556 U.S. 163, 174 (2009)

The division between the circuits means that in some circuits it is much more difficult for defendants to be heard on the merits of their retroactive constitutional claims than it is in others. The Court should grant certiorari to provide guidance on the meaning of § 2255(h) and on what portions of § 2244(b) it incorporates. Resolution of those issues will provide a single national standard governing successive § 2255 motions raising newly retroactive constitutional claims.

II. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THE SHOWING, IF ANY A FEDERAL MOVANT MUST MAKE UNDER 28 U.S.C. § 2244(b)).

Section 2244(b)(4) states that "[a] district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section" It is not clear, *see infra,* that § 2255(h) in referring to the authorization process incorporates § 2244(b)(4), and that question would be resolved in determining what authorization procedure is required under § 2255(h)(2). If § 2244(b)(4) does apply to federal § 2255 movants, as numerous of the courts of appeals have held, then the Court must resolve a split among those circuits as to what standard of proof is required to satisfy § 2244(b)(4) *test.*

To pass the § 2244(b)(4) test as interpreted by the Fifth Circuit, a movant must show that it is "more likely than not" that his challenge to the conviction or sentence relies on grounds supported by a new retroactive constitutional rule. C*lay,* 921 F.3d at 554, 558-59. Several other circuits adhere to this rule. *See, e.g., Dimott v. United States,* 881 F.3d 232, 243 (1st Cir. 2018); *Walker v. United States,* 900 F.3d 1012, 1015 (8th Cir. 2018); *Beeman v. United States,* 871 F.3d 1215, 1221-22 (11th Cir. 2017). The First Circuit expressed the rule as a requirement that a § 2255 movant "establish[ ] that it is more likely than not that he was sentenced *solely* pursuant to" the law held to be void for vagueness. *Dimott,* 881 F.3d at 243.

To pass the § 2244(b)(4) test in the Fourth and Ninth Circuits, however, a movant need show only that the challenged conviction or sentence "may have"

resulted from reliance by the trial court or jury on the unconstitutionally vague residual clause. *United States v. Winston,* 850 F.3d 677, 682 (4th Cir. 2017), *overruled on other grounds, Stokeling v. United States,* 139 S. Ct. 544 (2019); *United States v. Geozos,* 870 F.3d 890, 896 (9th Cir. 2017). The Ninth Circuit explained that the "may have" standard better accords with the statutes and the constitution. It opined that "when it is unclear from the record whether the sentencing court relied on the residual clause, it necessarily is unclear whether the court relied on a constitutionally valid or a constitutionally invalid legal theory." *Geozos,* 870 F.3d at 895. The court found "this situation is analogous to that of a defendant who has been convicted, in a general verdict, by a jury that was instructed on two theories of liability, one of which turns out to have been unconstitutional. The rule in such a situation is clear: "[W]here a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground." *Id.* at 895-96 (quoting *Griffin v. United States,* 502 U.S. 46, 53 (1991)); *see also Stromberg* v. *California*, 283 U.S. 359, 368 (1931).

The "may have" test is the better test, especially for *Davis* error because *Davis* error goes to the existence and validity of the conviction, not just, as in ACCA cases, to the validity of the sentence. Applying the "may have" test to § 924(c)(1) convictions that could rest on the unconstitutionally vague statute defining an offense upholds the principles of due process, the requirement of proof of beyond a reasonable doubt, and the guarantee that all the elements of the offense will be found by the jury. *Cf. In re Winship,* 397 U.S. 358 (1970); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

The split over whether to apply the "more-likely" or the "may-have" standard is critical to federal § 2255 movants invoking retroactive constitutional claims who have records that are ambiguous or silent through no fault of their own. Many records, such as Castillo's, are silent because the cases occurred before this Court's clarification of void-for-vagueness standards in *Johnson v. United States,* 576 U.S. 591 (2015) The standard applied is likely to be outcome determinative, as the Fifth Circuit has recognized, *Clay,* 921 F.3d at 559, and to mean the difference between a jurisdictional dismissal and a ruling on the merits of a conviction. See also *United States* v. *Peppers*, 899 F.3d 211, 223 (3d Cir. 2018) (Requiring more "would effectively turn the gatekeeping analysis into a merits determination.").

Castillo's case illustrates the importance of the "may have"/"more likely" divide and thus provides a good vehicle for resolving the issues presented. At the time of Castillo's trial, § 924(c)(3) defined crime of violence in two ways. The first was an elements test that looked to the elements of the predicate offense. 18 U.S.C. § 924(c)(3)(A). The second was a residual definition that captured offenses that, by their "nature, involve[ ] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(B). Castillo's indictment charged that he had committed a crime of violence by violating the Travel Act. Appendix C.

In relying on the Travel Act, the indictment did not set out an elements-based crime of violence. The Travel Act defined crime of violence according to the by-its-

nature definition of 18 U.S.C. § 16(b) and thus was reliant on the fact-finder's assessment of a defendant's conduct. *See* 18 U.S.C. § 1952.

At trial, the government introduced conduct evidence. It tried to link Castillo to a shooting that occurred at the home of a Julio Resendez on March 31, 2006. The government argued that the Resendez shooting was the relevant crime of violence under § 924(c). The government appeared to treat the conduct behind the Julio Resendez shooting as an attempted murder.

No attempted murder was alleged in the indictment, and no elements of an attempted murder offense were alleged. Nor did the jury instructions on count 33 require the jury to find that the elements of any particular crime of violence had been proved beyond a reasonable doubt. Appendix D. Instead, the district court "instruct[ed]" the jury "that interstate travel in aid of racketeering as charged in Counts 28 and 33 is a crime of violence." Appendix D. These instructions were correct at the time because both 18 U.S.C. § 16(b) and 18 U.S.C. § 924(c)(3)(B) still stood; neither had yet been declared void-for-vagueness; *Sessions v. DiMaya,* 138 S. Ct. 1204, 1210 (2018) and *Davis* were in the future. The jury may have simply accepted the instruction the Travel Act charge was a crime of violence and not bothered to parse the alternative drug conspiracy evidence to see if a § 924(c)(1) drug-trafficking offense had been shown.

Given that the district court told the jury that a residual clause crime was a crime of violence sufficient to convict Castillo, the conviction may have rested on the

§ 924(c)(3)(B) residual clause. In the Fourth and Ninth Circuits that fact would have been sufficient to allow Castillo to have his § 2255 claim heard on its merits. In the Fifth Circuit, his case was dismissed as wanting jurisdiction. Resolution of the questions Castillo presents will ensure that successive movants in all circuits face the same hurdles and have the same opportunity for success.

Conclusion

FOR THESE REASONS, Petitioner asks that the Court grant a writ of certiorari and review the judgment of the court of appeals.

/s/ PHILIP J. LYNCH
Counsel of Record for Petitioner

DATED: April 1, 2022.