

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

February 7, 2022

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

GERARDO CASTILLO-CHAVEZ,

Defendant—Appellant.

Application for Certificate of Appealability from the
United States District Court for the Southern District of Texas
USDC No. 5:16-CV-173

ORDER:

Gerardo Castillo-Chavez, federal inmate # 65736-279, moves for a certificate of appealability (COA) to appeal the dismissal, for lack of jurisdiction, of his successive 28 U.S.C. § 2255 motion challenging his conviction and sentence for possession and discharge of a firearm in furtherance of a crime of violence or drug trafficking crime. *See* 18 U.S.C. § 924(c). Castillo-Chavez contends that (1) his § 924(c) conviction is predicated on an underlying “crime of violence” defined as such under the now-invalid residual clause of § 924(c)(3)(B), *see United States v. Davis*, 139 S. Ct. 2319, 2336 (2019); and (2) there is a circuit split over whether a § 2255 movant must show that he was sentenced pursuant to § 924(c)’s residual

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clause by a preponderance of the evidence or whether he must show only that he “may have” been so sentenced, *see generally United States v. Clay*, 921 F.3d 550, 559 (5th Cir. 2019).

To obtain a COA, Castillo-Chavez must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To meet that burden, he must show “at least, that jurists of reason would find it debatable whether the [successive § 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Castillo-Chavez fails to make the requisite showing. Accordingly, the motion for a COA is DENIED.

/s/ Catharina Haynes

CATHARINA HAYNES
United States Circuit Judge