

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

February 7, 2022

Lyle W. Cayce
Clerk

No. 21-40196

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

No. 21-40196

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