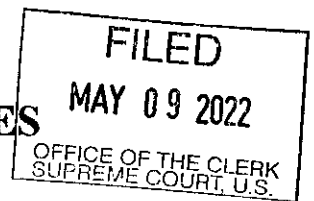


No. **21-7895** **ORIGINAL**

SUPREME COURT OF THE UNITED STATES



ANTOINE MAYES,

Petitioner,

v.

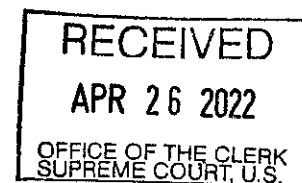
UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Antoine Mayes
Reg. No. 78351-053
ALLENWOOD
U.S. PENITENTIARY
P.O. BOX 3000
WHITE DEER, PA 17887



QUESTIONS PRESENTED

- I. WHETHER IT WAS ERROR FOR THE SECOND CIRCUIT TO DENY MAYES THE RIGHT TO FILE AN APPEAL OR COA IN LIGHT OF THE SUPREME COURT'S DECISION IN UNITED STATES V. DAVIS, 139 S. Ct. 2319 (2019).

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Antoine Mayes, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals is unpublished and included in Mayes's Appendix (Pet. App.) at A. The opinion of the district court's denial is unpublished and is included in Pet. App. at B.

JURISDICTION

On March 19, 2020, this Court entered an order automatically extending the time to file any petition for certiorari due on or after that day to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. Thus, this Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment (1791) establishes the requirement that a trial for a major crime may commence only after an indictment has been handed down by a grand jury; protects individuals from double jeopardy, being tried and put in danger of being punished more than once for the same criminal act; prohibits punishment without due process of law, thus protecting individuals from being imprisoned without fair procedures; and provides that an accused person may not be compelled

to reveal to the police, prosecutor, judge, or jury any information that might incriminate or be used against him or her in a court of law.

The Sixth Amendment (1791) provides several protections and rights to an individual accused of a crime. The accused has the right to a fair and speedy trial by a local and impartial jury. Likewise, a person has the right to a public trial. This right protects defendants from secret proceedings that might encourage abuse of the justice system, and serves to keep the public informed. This amendment also guarantees a right to legal counsel if accused of a crime, guarantees that the accused may require witnesses to attend the trial and testify in the presence of the accused, and guarantees the accused a right to know the charges against them.

STATEMENT OF THE CASE

For more detailed facts and background see the Court's prior opinions and orders at *United States v. Mayes*, No. 12-CR-385 (ARR), 2014 WL 3530862, at *1 (E.D.N.Y. July 10, 2014) (denying motions under Federal Rules of Criminal Procedure 29 and 33), *aff'd*, 650 F. App'x 787 (2d Cir. 2016) (summary order); *Mayes v. United States* ("Mayes I"), No. 12-CR-385 (ARR), 2018 WL 4558419 (E.D.N.Y. Sept. 21, 2018) (denying first motion to vacate under 28 U.S.C. § 2255); see also *Mayes v. United States* ("Mayes II"), No. 12-CR-385 (ARR), 2019 WL 1332885, at *1 (E.D.N.Y. Mar. 25, 2019) (denying first motion for reconsideration); *Mayes v. United States* ("Mayes III"), No. 12-CR-385 (ARR), 2019 WL 2912758, at *1 (E.D.N.Y. July 8, 2019) (denying second motion for reconsideration); *Mayes v. United States* ("Mayes IV"), No. 12-CR-385 (ARR), 2019 WL 6307411, at *2 (E.D.N.Y. Nov. 25, 2019) (denying third motion for reconsideration).

BACKGROUND:

On May 13, 2014, Mayes was convicted by a jury of the following eleven counts contained in the fourth superseding indictment:

Count One: Racketeering, 18 U.S.C. §§ 1961(1), (5), 1962(c);

Count Two: Unlawful Use and Possession of Firearms, 18 U.S.C. § 924(c);

Count Four: Conspiracy to Commit Murder in Aid of Racketeering, 18 U.S.C. § 1959(a);

Count Five: Attempted Murder in Aid of Racketeering, 18 U.S.C. § 1959(a);

Count Six: Unlawful Use and Discharge of a Firearm, 18 U.S.C. § 924(c);

Count Seven: Attempted Murder in Aid of Racketeering, 18 U.S.C. § 1959(a);

Count Eight: Unlawful Use and Discharge of a Firearm, 18 U.S.C. § 924(c);

Count Nine: Attempted Murder in Aid of Racketeering, 18 U.S.C. § 1959(a);

Count Ten: Unlawful Use and Discharge of a Firearm, 18 U.S.C. § 924(c);

Count Eleven: Attempted Possession of Cocaine with Intent to Distribute, 18 U.S.C. §§ 841(b), 846; and

Count Twelve: Possession of Cocaine Base with Intent to Distribute, 21 U.S.C. § 841(a)–(b).

On January 8, 2015, Mayes was sentenced to a total term of 110 years' imprisonment, consisting of concurrent sentences of 5 years' imprisonment on each of Counts One, Six, Seven, Nine, Eleven, Thirteen, and Fourteen, as well as consecutive sentences of 30 years' imprisonment on Count Two, 25 years' imprisonment on Count Eight, 25 years' imprisonment on Count Ten, and 25 years' imprisonment on Count Twelve. Crim J. 3–4. On January 15, 2015, Mayes appealed the judgment against him, Notice of Appeal, ECF No. 258, and on November 6, 2015, he submitted his opening brief to the Second Circuit, Br. & App., *United States v. Mayes*, No. 13- 2331 (2d Cir. Nov. 6, 2015), ECF No. 122. On May 31, 2016, the circuit affirmed the judgment. *United States v. Mayes*, 650 F. App'x 787 (2d Cir. 2016) (summary order).

On November 16, 2017, Mayes filed a motion under 28 U.S.C. § 2255 seeking “to set aside [his] four-gun convictions, which compose the vast majority of his sentence, on the grounds of ineffective assistance of counsel and lack of due process.” *Mayes I*, 2018 WL 4558419, at *1; see *First Mot. Vacate*, ECF No. 306. The Court ultimately denied that motion, as well as Mayes' three subsequent motions to reconsider the denial, on both procedural grounds and the merits. See *Mayes I*, 2018 WL 4558419; *Mayes II*, 2019 WL 1332885; *Mayes III*, 2019 WL 2912758; *Mayes IV*, 2019 WL 6307411. Mayes appealed the denial, Notice of Appeal, ECF No. 331, and on May 28, 2020, the circuit dismissed his appeal, *Mot. Order*, *Mayes v. United States*, No. 19-1556 (2d Cir. May 28, 2020), ECF No. 89.

On June 22, 2020, Mayes filed a second § 2255 motion. Second Mot. Vacate, ECF No. 356; see also Am. Second Mot. Vacate, ECF No. 357. The Court determined that this new motion was an unauthorized successive motion under § 2255(h), and denied it on that basis. See Text Order (June 26, 2020). Consequently, Mayes sought authorization from the Second Circuit to file a successive § 2255 motion. Not. Appeal, ECF No. 358; see Mot. File Successive Pet., Mayes v. United States, No. 20-3123 (2d Cir. Sept. 11, 2020), ECF No. 2.

The circuit concluded that because Mayes' second § 2255 motion was filed prior to final adjudication of his first § 2255 motion, it would not in fact be a successive motion. 2d Cir. Order 1–2, ECF No. 374 (noting that adjudication of the first motion became final only when “Mayes’ time to petition the Supreme Court for writ of certiorari expired in August 2020”). The circuit then transferred the matter back to this court “for whatever further action the district court finds appropriate, as if it had been filed directly in the district court.” *Id.* at 2 (citation omitted). The circuit also specifically instructed me to “determine in the first instance what effect, if any, [the Court’s] prior decision,” denying Mayes’ first § 2255 motion, “has on Mayes’ present claims.” *Id.* at 2 n.*.

In accordance with the circuit’s directive, The Court ordered the government to file a response to Mayes’ second § 2255 motion. Text Order (Feb. 12, 2021). On March 15, 2021, the government filed its opposition, Gov’t’s Opp’n, ECF No. 378, and on April 6, 2021, Mayes filed a reply, Pet’r’s Reply, ECF No. 385.

Mayes’ second § 2255 motion seeks relief on three principal grounds that overlap in large part with the arguments raised in Mayes’s first § 2255 motion. First, Mayes argues that “[b]ecause Count [Two] of the indictment charged one or more Section 924(c) offenses based on multiple predicate offenses, some of which do not constitute crimes of violence[,] and because the general-jury-verdict form did not specify as to what racketeering acts the firearm conviction[] applied, . . . the firearm conviction[] must be vacated.” Mot. File Successive Pet. 8–17, 25–27. Second, Mayes argued that “th[is] firearm conviction [] must also be vacated” because it “may rest on uncharged acts of racketeering.” *Id.* at 17–21. Third, Mayes argued that because attempted murder can no longer serve as a predicate crime for a § 924(c) firearm conviction, his convictions on Counts Six, Eight, and Ten must be vacated. *Id.* at 23–25. In asserting these new claims, Mayes relies primarily on the Supreme Court’s recent decision in *Davis* and the Second Circuit’s subsequent decision in *United States v. Barrett* (“*Barrett II*”), 937 F.3d 126 (2d Cir. 2019), which abrogated the circuit’s pre-Davis decision in *United*

States v. Barrett (“Barrett I”), 903 F.3d 166 (2d Cir. 2018). See Pet’r’s Reply 7–8; 2d Cir. Order 2 n.*. Mayes seeks vacatur of his firearms convictions and resentencing. Mot. File Successive Pet. 19, 21, 24; Am. Second Mot. Vacate 5, 10, 13.

THE ARGUMENT

In Davis, the Supreme Court struck down as unconstitutionally vague § 924(c)(3)(B), commonly known as the “residual clause.” 139 S. Ct. at 2323–24. Davis itself followed the Supreme Court’s earlier decisions in Johnson v. United States and Sessions v. Dimaya, which had struck down similar residual clauses in other statutes. 576 U.S. 591 (2015) (striking down residual clause in 18 U.S.C. § 924(e)(2)(B)(ii)); 138 S. Ct. 1204 (2018) (striking down residual clause in 18 U.S.C. § 16(b)).

Thus, a conviction under § 924(c) can now only be sustained if the predicate offense qualifies as either a “drug trafficking crime” or a “crime of violence,” as defined in § 924(c)(3)(A), commonly known as the “elements clause” or the “force clause.” See United States v. Heyward, No. 19-1054, 2021 WL 2638609, at *4 (2d Cir. June 28, 2021); United States v. Culbert, 453 F. Supp. 3d 595, 597 (E.D.N.Y. 2020) (“Any valid application of § 924(c) . . . must proceed from an underlying conviction qualifying under the elements clause.”). To determine whether a predicate offense qualifies as a crime of violence under the elements clause, the Court must employ what is called the categorical approach, under which the court “identify the minimum criminal conduct necessary for conviction under a particular statute,” “look[ing] only to the statutory definitions—i.e., the elements—of the offense, and not to the particular underlying facts.” United States v. Thrower, 914 F.3d 770, 774 (2d Cir. 2019) (citation and quotation marks omitted); see also, e.g., Heyward, 2021 WL 2638609, at *4; Barrett II, 937 F.3d at 128. “A state criminal offense may serve as a predicate crime of violence only if it categorically requires proof of the elements listed in the elements clause.” Rudaj v. United States, No. 04-CR-1110 (DLC), 2021 WL 1172333, at *5 (S.D.N.Y. Mar. 29, 2021).

As a further consequence of Davis, the Supreme Court vacated the Second Circuit’s judgment in Barrett I, see Barrett v. United States, 139 S. Ct. 2774, (2019), upon which my initial denial of petitioner’s first § 2255 motion partially relied. See Mayes I, 2018 WL 4558419, at *4 (explaining that Barrett I had “distinguished” § 924(c)(3)(B) from “the statutes at issue in Johnson and

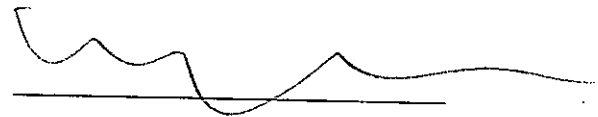
Dimaya”). On remand, the Second Circuit decided *Barrett II*, which held that, after *Davis*, a conspiracy to commit a violent felony was not categorically a crime of violence and could no longer support a conviction under § 924(c)’s remaining elements clause. 937 F.3d at 127, 129; see also *Heyward*, 2021 WL 2638609, at *4.

WHEREFORE, Mayes asks the Court to “grant a resentencing without the enhancements for 18 U.S.C. § 924(c) and resentence without the attempted murder racketeering acts.” See 28 U.S. C. section 2106.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Antoine Mayes', written over a horizontal line.

Antoine Mayes, pro-se

DATED: April 2nd, 2022