United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 14, 2022
Lyle W. Cayce
Clerk

No. 18-10940

UNITED STATES OF AMERICA,

Plaintiff—Appellant,

versus

MICHAEL DEWAYNE VICKERS,

Defendant—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:15-CV-3912

Before SMITH, HIGGINSON, and ENGELHARDT, *Circuit Judges*.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is REMANDED to the District Court for further proceedings in accordance with the opinion of this Court.

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PER CURIAM:*

This panel's prior decision, found at 967 F.3d 480 (5th Cir. 2020), returns to us on remand from the Supreme Court. *See Vickers v. United States*, 141 S. Ct. 2783 (2021). In turn, we REMAND this case to the district court for further consideration in light of *Borden v. United States*, 141 S. Ct. 1817 (2021). On remand, the district court should first determine whether

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

there is jurisdiction to consider Vickers's successive 28 U.S.C. § 2255 petition in light of our decisions in *United States v. Wiese*, 896 F.3d 720 (5th Cir. 2018), and *United States v. Clay*, 921 F.3d 550 (5th Cir. 2019).

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ORDER:

The Appellee's motion for stay of the mandate pending petition for writ of certiorari is GRANTED through June 13, 2022.

STEPHEN A. HIGGINSON
United States Circuit Judge

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

February 08, 2022

TO COUNSEL LISTED BELOW:

No. 18-10940 USA v. Vickers
USDC No. 3:15-CV-3912

Dear Counsel,

The oral argument panel directs that counsel file letter briefs of not more than 5 pages addressing whether this court has appellate jurisdiction. Specifically, the letters should discuss whether Mr. Vickers's claim is constitutional and whether he met the requirement in 28 U.S.C. § 2244(b)(4) for a second or successive habeas petition. See United States v. Clay, 921 F.3d 550 (5th Cir. 2019); United States v. Wiese, 896 F.3d 720 (5th Cir. 2018). The letter briefs should be filed on or before noon of February 23, 2022.

Your letter brief should be in letter form addressed to the Clerk of Court. See FRAP 32 (a) (4), (5), and (6) for format guidelines. When electronically filing the brief, either ECF Appellant's Supplemental Brief Filed or ECF Appellee's Supplemental Brief Filed should be selected and the docket text should be edited to reflect that it is a 'supplemental letter' brief. Paper copies are not required for this type of filing. The following link provides instructions on filing a brief in a Fifth Circuit case: http://www.ca5.uscourts.gov/cmecf/file%20a%20brief.pdf

Sincerely,

LYLE W. CAYCE, Clerk

Pam Trice

By: _____
Pamela F. Trice, Deputy Clerk
504-310-7633

Ms. Amy Jeannine Mitchell
Mr. James Matthew Wright

cc: Mr. Kevin Joel Page
Ms. Leigha Amy Simonton

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Via ECF
February 23, 2022

Lyle W. Cayce
Clerk of the Court
U.S. Court of Appeals for the Fifth Circuit
600 South Maestri Place
New Orleans, Louisiana 70130

Re: *United States v. Vickers*, No. 18-10940: Appellate Jurisdiction

Dear Mr. Cayce:

This Court has appellate jurisdiction under 18 U.S.C. § 3742(b) because the Government only appealed the June 27, 2018 criminal judgment. If the Government had perfected an appeal of the June 5, 2018 civil judgment, the Court would have appellate jurisdiction under 28 U.S.C. §§ 1291 and 2253. Mr. Vickers satisfies the "gatekeeping" requirements for 28 U.S.C. § 2255(h)(2) motions because the district court relied on the ACCA's residual clause at sentencing. Over six years of litigation in three courts, the Government has never yet argued otherwise.

This Court granted pre-filing authorization because Mr. Vickers's successive motion contained the new rule announced in *Johnson v. United States*, 576 U.S. 591 (2015). ROA.868–869. Mr. Vickers also satisfies the judicially crafted gatekeeping

standard adopted in *United States v. Wiese*, 849 F.3d 1313 (5th Cir. 2018), and *United States v. Clay*, 921 F.3d 550 (5th Cir. 2019). Under "the relevant background legal environment that existed at the time of the defendant's sentencing," *Wiese*, 896 F.3d at 725, there was no way his Texas murder conviction could satisfy the ACCA's elements clause. As in *United States v. Taylor*, 873 F.3d 476, 482 (5th Cir. 2017), the residual clause was necessary because pre-sentencing precedent ruled out the elements clause for the third predicate. Unlike *Taylor*, the district court here correctly reached the merits and granted relief on the constitutional claim. ROA.950–953.

To evaluate whether the district court historically "relied on" the residual clause, this Court "looks to the law at the time of sentencing." *Clay*, 921 F.3d at 556 (quoting *Wiese*, 896 F.3d at 724) (cleaned up). When Mr. Vickers was sentenced, on July 5, 2007, entrenched Fifth Circuit precedent not only "suggest[ed]," but, *insisted* "that [Vickers's] third predicate conviction" for Texas murder "could have applied only under the residual clause." *Taylor*, 873 F.3d at 482.

First, *United States v. Calderon-Pena* strictly limited the inquiry to "the *elements* of the crime, not to the defendant's actual conduct in committing it."383 F.3d 254, 257 (5th Cir. 2004). Even where "the actual conduct described in the indictments could be construed to involve the use of physical force against the person of another," these allegations were "irrelevant for purposes of" applying the elements clause. *Id.*

Second, this Court had repeatedly and unambiguously held that Texas result-oriented crimes—defined by the *result* or *harm* the defendant inflicted—did not satisfy

the elements clause. *See United States v. Vargas-Duran*, 356 F.3d 598, 606 (5th Cir. 2004) (recognizing a distinction "between a defendant's causation of an injury and the defendant's use of force"). That reasoning would exclude all three forms of Texas murder,[1] which are defined by the *result*. The victim's death could be caused by "any of a number of acts, without use of 'destructive or violent force,'" such as "making available to the victim a poisoned drink while reassuring him the drink is safe, or telling the victim he can safely back his car out while knowing an approaching car driven by an independently acting third party will hit the victim." *United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006).

Third, shortly before Mr. Vickers's sentencing, this Court applied the ACCA's residual clause to hold that another of Texas's result-oriented crimes was a violent felony under the residual clause, not the elements clause. *See United States v. Davis*, 487 F.3d 282 (5th Cir. 2007). Texas robbery, like murder and assault, could not satisfy the *Vargas-Duran* and *Calderon-Pena* interpretation of the elements clause because "it does not define 'robbery' in terms of the use or threat of force." *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 379 & n.3 (5th Cir. 2006). *Davis* held that Texas robbery could nonetheless satisfy the ACCA's residual clause because the conduct described by the elements, "in the ordinary case, presents a serious potential risk of physical injury to another." 487 F.3d at 286–287. The same is true of murder.

[1] Tex. Penal Code § 19.02(a)(1)–(3) in 1982; (b)(1)–(3) today.

Years later, the jurisprudential landscape changed. In 2014, the Supreme Court held that deploying poison against a family member is a use of physical force against the victim, at least for purposes of 18 U.S.C. § 922(g)(9). *United States v. Castleman*, 572 U.S. 157, 170 (2014). In 2018, this Court extended *Castleman*'s reasoning to overrule *Villegas-Hernandez*, *Vargas-Soto*, *Calderon-Pena*, and a host of other cases. *See United States v. Reyes-Contreras*, 910 F.3d 169, 186 (5th Cir. 2018).

Those intervening decisions matter to the current-law merits of this appeal, but not to the historical-law gatekeeping inquiry required by *Wiese* and *Clay*. Appellate decisions in 2014–2018 are "of no consequence to determining the mindset of a sentencing judge" in 2007. *Wiese*, 896 F.3d at 725. The legal landscape in 2007 establishes, by a preponderance of the evidence, that the district court relied on the ACCA's residual clause in when it sentenced Mr. Vickers. Mr. Vickers's motion thus contains and relies on the new rule in *Johnson*, which is exactly the type of successive motion Congress authorized in § 2255(h)(2).

Should the Court disagree, Mr. Vickers preserves for further review: (a) the district-court gatekeeping procedure in § 2244(b)(4) does not apply to § 2255(h) motions;[2] (b) the *Wiese-Clay* framework deviates from the text of § 2255(h)(2);[3] and

[2] Section 2255(h) requires prefiling authorization "as provided in section 2244." *Reyes-Requena v. United States*, 243 F.3d 895 (5th Cir. 2001), held that § 2255(h) implicitly incorporated additional aspects of the state-prisoner § 2244 procedure, including the district-court gatekeeping step found in § 2244(b)(4). This is when the *Wiese-Clay* inquiry is supposed to be performed.

[3] Section 2244(b)(2)(A) sets the new-constitutional-rule standard for state prisoners, while § 2255(h)(2) sets the standard for federal prisoners. The provisions are not the same. *United States v.*

(c) any gatekeeping requirement is, at most, a claims-processing issue that the Government long ago waived.[4] "[I]t would be passing strange if, after a [prefiling authorization] has issued, each court of appeals adjudicating an appeal were dutybound to revisit the threshold showing and gauge" the strength of the evidence about a judge's reconstructed state-of-mind from a long-ago sentencing hearing "to verify its jurisdiction." *Gonzalez v. Thaler*, 565 U.S. 134, 143 (2012).

The Government has, for six years, consistently asked for a merits determination applying current federal sentencing law to Mr. Vickers's *Johnson* claim. ROA.856–861. Party-presentation is the heart of our adversarial judicial system. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1578–79 (2020); *Greenlaw v. United States*, 554 U.S. 237, 243–44 (2008). The Court should affirm.

Respectfully,

/s/ *J. Matthew Wright*
Assistant Federal Public Defender

MacDonald, 641 F.3d 596, 609 (4th Cir. 2011). A state prisoner must show that his proposed claim "relies on" the new rule; a federal prisoner need only show that his proposed motion "contains" the new rule. *Id.*; *see also In re Hoffner*, 870 F.3d 301, 307 n.9 (3d Cir. 2017). "This 'difference in language'—in one section, what a claim requires; in the other, what a motion requires—'demands a difference in meaning.'" *Raines v. United States*, 898 F.3d 680, 692 (6th Cir. 2018) (Cole, C.J., concurring); *accord In re Bradford*, 830 F.3d 1273, 1276 n.1 (11th Cir. 2016) (§ 2255(h) "cannot incorporate § 2244(b)(2)."). Even under § 2244(b)(2)(A), though, the *claim* must "rely on" the new rule. Neither statute discusses reliance by, or the "mindset" of, the original *decisionmaker* who committed the as-yet-unknown error. *Contra Wiese*, 896 F.3d at 725.

[4] The Government agrees that the substantive gatekeeping requirements are waivable, non-jurisdictional, claims-processing rules. *Williams v. United States*, 927 F.3d 427, 439 (6th Cir. 2019).

Certificate of Service

I filed this letter via the Court's ECF system. Opposing Counsel is a registered filer and is considered served.

/s/ J. Matthew Wright

Certificate of Compliance

1. This letter complies with the five-page limit set by the Court's February 8, 2022 order.

2. The letter complies with the format guidelines of Fed. R. App. P. 32(a)(4)–(6). The document has been prepared in MS Word 16, using double-spaced 14-point Garamond typeface. The body of the letter including footnotes contains 1,249 words.

/s/ J. Matthew Wright