FILED
United States Court of Appeals
Tenth Circuit

October 5, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

HERBERT ISAAC PERKINS,

Defendant - Appellant.

No. 22-2043
(D.C. Nos. 1:16-CV-00714-KWR-JHR &
1:07-CR-01010-KWR-1)
(D. N.M.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **PHILLIPS**, **MORITZ**, and **EID**, Circuit Judges.

Herbert Isaac Perkins seeks a certificate of appealability (COA) to appeal from the district court's dismissal of his successive 28 U.S.C. § 2255 motion. We deny a COA.

I. Background

A jury convicted Mr. Perkins of four counts for his role in a convenience-store robbery: one count of interference with commerce by threats or violence, in violation of 18 U.S.C. § 1951 (also known as Hobbs Act robbery); two counts of discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c); and one count of being a felon in possession of ammunition, in violation of 18 U.S.C.

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

§ 922(g)(1). The district court sentenced Mr. Perkins to life in prison on the first count (Hobbs Act robbery), after enhancing his sentence under the three-strikes provision in 18 U.S.C. § 3559(c)(1). That provision mandates the imposition of a life sentence when a person is convicted in federal court of a serious violent felony and the person has two or more prior convictions for serious violent felonies. *See* § 3559(c)(1)(A)(i). The court sentenced Mr. Perkins to a 10-year sentence on the first § 924(c) count and a 25-year sentence on the second § 924(c) count. And it sentenced him to a 780-month sentence for the § 922(g)(1) count. The § 922(g)(1) conviction was subject to the enhanced-penalty provisions of the Armed Career Criminal Act (ACCA) in 18 U.S.C. § 924(e), and Mr. Perkins was also found to a be a career offender under § 4B1.1 of the Sentencing Guidelines.

Mr. Perkins appealed, and we affirmed the judgment. *United States v. Perkins*, 342 F. App'x 403, 412 (10th Cir. 2009). He then filed his first § 2255 motion, which the district court denied.

After the Supreme Court issued its decision in *Johnson v. United States*, 576 U.S. 591 (2015), Mr. Perkins filed another § 2255 motion, seeking relief based on *Johnson*. The district court determined the motion was an unauthorized second or successive § 2255 motion and transferred it to this court. We subsequently directed Mr. Perkins to supplement his motion for authorization to address the implications of the decisions in *United States v. Davis*, 139 S. Ct. 2319 (2019), and *United States v. Bowen*, 936 F.3d 1091 (10th Cir. 2019).

We then granted authorization for Mr. Perkins to file a successive § 2255 motion to challenge his § 924(c) convictions and sentences and the enhancement of his sentence under the ACCA. He subsequently filed a successive § 2255 motion seeking to challenge his § 924(c) convictions and sentences and the ACCA sentencing enhancement, as well as his conviction for Hobbs Act robbery.

He argued his Hobbs Act robbery and § 924(c) convictions were invalid under *Davis* because Hobbs Act robbery qualified as a predicate crime of violence only as that term is defined in § 924(c)(3)'s residual clause. In *Davis*, the Supreme Court held that the residual clause in § 924(c)(3)(B) is unconstitutionally vague. 139 S. Ct. at 2336. He also argued his sentence for his § 922(g)(1) conviction was invalid because he did not have three previous convictions that met the definition of a violent felony without the use of the residual clause in § 924(e). In *Johnson*, the Supreme Court held that the residual clause in § 924(e)(2)(B) is unconstitutionally vague. 576 U.S. at 606.

The magistrate judge concluded: (1) the district court lacked jurisdiction to address the merits of the challenge to the Hobbs Act robbery conviction because the Tenth Circuit had not granted authorization to challenge that conviction; (2) the holding in *Davis* does not extend to the elements clause in § 924(c)(3)(A), and it is settled law in the Tenth Circuit that Hobbs Act robbery is categorically a crime of violence under the elements clause; and (3) Mr. Perkins has three or more prior convictions that meet the definition of violent felony without the use of the residual clause in § 924(e). The magistrate judge therefore recommended dismissing Mr. Perkins's § 2255 motion with prejudice.

Mr. Perkins filed objections to the magistrate judge's proposed findings and recommended dispositions. The district court overruled the objections, adopted the magistrate judge's proposed findings and recommended dispositions, and dismissed the § 2255 motion with prejudice. Mr. Perkins now seeks a COA to appeal from that dismissal.

II. Discussion

A. *Hobbs Act robbery claim*

To obtain a COA of the district court's procedural ruling that it lacked jurisdiction to address Mr. Perkins's challenge to his Hobbs Act robbery conviction, he must show both "that jurists of reason would find it debatable whether the petition 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). We need not address the constitutional question if we conclude that reasonable jurists would not debate the district court's resolution of the procedural one. *See id*. at 485.

Mr. Perkins argues the district court erred in ruling that this court "did not authorize the review of the Hobbs Act robbery conviction," R., vol. 1 at 207. But he conceded in his successive § 2255 motion that our authorization order "did not address directly [his] challenge to the conviction and sentence on Count 1 [(Hobbs Act robbery)]." *Id.* at 148.

We have explained that "under the plain language of §§ 2255(h) and 2244(b)(3), prisoners must first obtain circuit-court authorization before filing a second or successive

habeas claim in district court." *In re Cline*, 531 F.3d 1249, 1252 (10th Cir. 2008) (per curiam). And we have further explained that "[a] district court does not have jurisdiction to address the merits of a second or successive § 2255 . . . claim until this court has granted the required authorization." *Id.* at 1251.

Our order granted Mr. Perkins "authorization to file a second or successive § 2255 motion in district court *limited* to challenges to his § 924(c) convictions and sentence and to the enhancement of his sentence under the ACCA." R., vol. 1 at 44 (emphasis added). We did not grant authorization for him to challenge his Hobbs Act robbery conviction. *See id*. Reasonable jurists would therefore not debate the district court's procedural ruling that it lacked jurisdiction to consider the merits of Mr. Perkins's unauthorized successive § 2255 claim challenging his Hobbs Act robbery conviction.

B. *Section 924(c) and ACCA claims*

When a district court has rejected § 2255 claims on the merits, the showing to obtain a COA "is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484.

In his COA application, Mr. Perkins argues that Hobbs Act robbery is not a crime of violence as defined in § 924(c)(3)(A). But he also "acknowledges authority from the Tenth Circuit that is contrary to his position with respect to the issue whether Hobbs Act robbery is a crime of violence under the elements clause in § 924(c)(3)(A)." COA Appl. at 24 (citing *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1065 (10th Cir. 2018)). And he further "acknowledges Circuit authority precluding this panel from diverging

from the prior precedent of another panel of this Court 'absent *en banc* reconsideration or a superseding contrary decision by the Supreme Court.'" *Id.* at 24-25 (quoting *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993)). At the conclusion of his argument, he states that he "raises this issue for purposes of preservation for *en banc* reconsideration and/or Supreme Court review." *Id.* at 29.

Binding Tenth Circuit precedent holds that Hobbs Act robbery is categorically a crime of violence under the elements clause in § 924(c)(3)(A), *see Melgar-Cabrera*, 892 F.3d at 1060-61, 1060 n.4, 1065; *United States v. Baker*, ___F.4th___, No. 3062, 2022 WL 4458434, at *5-8 (10th Cir. Sept. 26, 2022), and Mr. Perkins's § 924(c) convictions were predicated on his Hobbs Act robbery conviction. Reasonable jurists could therefore not debate the district court's conclusion that Mr. Perkins's § 924(c) convictions remain valid after *Davis*.

Finally, Mr. Perkins argues he has not been convicted of three or more violent felonies within the meaning of § 924(e). But he again acknowledges that there is contrary Tenth Circuit precedent on whether certain of his convictions satisfy the elements clause under the ACCA. *See* COA Appl. at 31 (citing *United States v. Manzanares*, 956 F.3d 1220, 1226 (10th Cir. 2020), *cert. denied*, 141 S. Ct. 1396 (2021)). And he again states he is raising this issue to preserve it for en banc consideration and/or Supreme Court review. *Id.*

Because binding Tenth Circuit precedent holds that convictions for New Mexico armed robbery and New Mexico aggravated battery are violent felonies under the elements clause in § 924(e), *see Manzanares*, 956 F.3d at 1226, 1228, and Mr. Perkins's

sentence was enhanced due to prior convictions for those same offenses, reasonable jurists would not debate the district court's determination that his ACCA sentence enhancement remains valid after *Johnson*.

III. Conclusion

We deny a COA.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
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Christopher M. Wolpert
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October 05, 2022

Scott M Davidson
Scott M. Davidson, Ph.D., Esq., LLC
1011 Lomas Blvd. NW
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RE: 22-2043, United States v. Perkins
Dist/Ag docket: 1:16-CV-00714-KWR-JHR & 1-07-CR-01010-KWR-1

Dear Counsel:

Attached is a copy the court's final order issued today in this matter.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Paige Messec

CMW/at

FILED
United States Court of Appeals
Tenth Circuit

May 15, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: HERBERT ISAAC PERKINS, Movant.	No. 17-2017 (D.C. Nos. 1:16-CV-00714-MV-WPL & 1:07-CR-01010-MV-1) (D.N.M.)

ORDER

Before **TYMKOVICH**, Chief Judge, **BRISCOE** and **BACHARACH**, Circuit Judges.

Movant, Herbert Isaac Perkins, proceeding through counsel, seeks authorization to file a second or successive 28 U.S.C. § 2255 motion in the district court so he may challenge his convictions and sentence under 18 U.S.C. § 924(c), the enhancement of his sentence under the Armed Career Criminal Act, (ACCA), 18 U.S.C. § 924(e), and the enhancement of his sentence under the career offender sentencing guideline, U.S. Sentencing Guidelines Manual § 4B1.1 (U.S. Sentencing Comm'n 2007). *See* 28 U.S.C. §§ 2255(h), 2244(b)(3). This matter is currently abated; we now lift the abatement.

Movant was convicted under § 924(c) of two counts of discharging a firearm during and in relation to a crime of violence. He alleges his convictions are invalid because the underlying offense qualified as a "crime of violence" only as that term is defined in § 924(c)(3)'s residual clause. The Supreme Court invalidated this clause as unconstitutionally vague in *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019).

Movant was also convicted of a firearms offense in violation of 18 U.S.C. § 922(g). He alleges that his sentence for that offense was enhanced under the ACCA based on his having three qualifying prior convictions, *see* 18 U.S.C. § 924(e)(1), at least one of which was a violent felony. Movant alleges that the enhancement of his sentence under the ACCA is invalid because one or more of his prior offenses qualified as a "violent felony" only as that term was defined in the ACCA's residual clause. The Supreme Court invalidated that provision as unconstitutionally vague in *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015). Similarly, Movant alleges that the enhancement of his sentence under the career offender guideline, which has an identically worded residual clause as that in the ACCA, is invalid under *Johnson*.

To obtain authorization, movant must make a prima facie showing that his second or successive § 2255 motion meets the gatekeeping requirements of § 2255(h). 28 U.S.C. § 2244(b)(3)(C); *see also United States v. Murphy*, 887 F.3d 1064, 1067 (10th Cir.), *cert. denied*, 139 S. Ct. 414 (2018). In assessing this showing, we do not consider the merits of the second or successive motion.[1] *See In re Barrett*, 840 F.3d 1223, 1227 (10th Cir. 2016); *Ochoa v. Sirmons*, 485 F.3d 538, 544 (10th Cir. 2007) (per curiam). A motion may be authorized under § 2255(h)(2) if it relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

[1] In limiting our consideration of this motion to the requirements of § 2255(h), we do not consider the existence or applicability of any plea-agreement waiver that may have been executed. We leave that and other merits considerations for the district court.

We conclude that movant has made the required prima facie showing to challenge his § 924(c) convictions under *Davis*. The Supreme Court announced a new rule of constitutional law in *Davis* and the Court has made *Davis* retroactive to cases on collateral review through the combination of its holdings in *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016), and *Davis*. *See In re Mullins*, 942 F.3d 975, 979 (10th Cir. 2019).

We further conclude that movant has made the required prima facie showing to challenge the sentencing enhancement under the ACCA based on *Johnson*. The Supreme Court announced a new rule of constitutional law in *Johnson* and made it retroactive to cases on collateral review in *Welch v. United States*, 136 S. Ct. at 1265.

We finally conclude that movant has not made the required prima facie showing to challenge the sentencing enhancement under the career offender guideline based on *Johnson*, however. The requirements of § 2255(h)(2) are not satisfied by citing a new rule of law in the abstract. Rather, to receive authorization, the proposed successive § 2255 motion must rely on the new rule of law. *See Murphy*, 887 F.3d at 1067. In *Beckles v. United States*, 137 S. Ct. 886, 890 (2017), the Supreme Court rejected the argument that the career offender guideline's residual clause, like that in the ACCA, is void for vagueness under *Johnson*. The Court held that the advisory guidelines are not subject to vagueness challenges under the Due Process Clause. *Id.* Accordingly, movant's challenge to the enhancement of his sentence under the career offender guideline does not rely on *Johnson*. We therefore deny movant authorization to file a

second or successive § 2255 motion that includes a challenge to the enhancement of his sentence under the career offender guideline.[2]

Movant's motion for authorization is granted in part and denied in part. We grant Movant authorization to file a second or successive § 2255 motion in district court limited to challenges to his § 924(c) convictions and sentence and to the enhancement of his sentence under the ACCA. The denial of authorization "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

In the interest of justice, we direct the Clerk pursuant to 28 U.S.C. § 1631 to transfer the now–authorized successive § 2255 motion and supplement back to the district court for the District of New Mexico.[3] The authorized § 2255 motion shall proceed in the district court as though filed on June 26, 2016, the date the § 2255 motion was initially

[2] Judge Bacharach does not join the denial of authorization for this claim. He would instead simply grant authorization to file a second or successive § 2255 motion that includes movant's challenge to his conviction under 18 U.S.C. § 924(c) or his ACCA sentencing enhancement based on *Davis* and *Johnson*. *See Nevius v. McDaniel*, 104 F.3d 1120, 1121 (9th Cir. 1996); *United States v. Winestock*, 340 F.3d 200, 205 (4th Cir. 2003), *abrogated in part on other grounds by United States v. McRae*, 793 F.3d 392 (4th Cir. 2015).

[3] The district court initially transferred the successive § 2255 motion to this court in February 2017.

filed in district court. *See* 28 U.S.C. § 1631; *Coleman v. United States*, 106 F.3d 339, 341 (10th Cir. 1997) (per curiam).

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

HERBERT ISAAC PERKINS,

Petitioner,

v.

Nos. 1:16-cv-00714-KWR-JHR
1:07-cr-01010-KWR-1

UNITED STATES OF AMERICA,

Respondent.

ORDER DENYING ISSUANCE
OF A CERTIFICATE OF APPEALABILITY

THIS MATTER comes before the Court on the Tenth Circuit's limited remand to consider whether to issue a certificate of appealability. To obtain a certificate, Perkins must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires Perkins to "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issue presented was 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (alteration in original) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

U.S. Magistrate Judge Jerry H. Ritter recommended that a certificate of appealability be denied [Doc. 20, p. 7], and the Court adopted Magistrate Judge Ritter's recommendations. [Doc. 27, p. 5]. Furthermore, reasonable jurists could not debate (1) that the Tenth Circuit's partial authorization does not contain any language authorizing review of the Hobbs Act robbery conviction, and (2) that *Melgar-Cabrera*[1] and *Manzanares*[2] are binding in this case and precludes relief. Therefore, the Court denies issuing a certificate of appealability.

[1] *United States v. Melgar-Cabrera*, 892 F.3d 1053 (10th Cir. 2018).
[2] *United States v. Manzanares*, 956 F.3d 1220 (10th Cir. 2020).

IT IS SO ORDERED.

KEA W. RIGGS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

HERBERT ISAAC PERKINS,

Petitioner,

v.

CV 16-0714 KWR/JHR
CR 07-1010 KWR

UNITED STATES OF AMERICA,

Respondent.

PROPOSED FINDINGS AND RECOMMENDED DISPOSITIONS

THIS MATTER comes before the Court on Petitioner Herbert Isaac Perkins' Successive Motion Pursuant to 28 U.S.C. § 2255 [Doc. 20], filed July 9, 2020. Pursuant to 28 U.S.C. § 636(b), presiding District Judge Kea W. Riggs referred this case to me "to conduct hearings, if warranted, including evidentiary hearings, and to perform any legal analysis required to recommend to the Court an ultimate disposition of the case." [Doc. 17]. Having thoroughly reviewed the parties' submissions and the relevant law, I recommend the Court deny the Motion with prejudice.

I. BACKGROUND

Perkins was convicted after a jury trial of multiple crimes including violation of 28 U.S.C. §§ 1151 and 1152 (Hobbs Act Robbery), and this Court sentenced him to a life term imprisonment. [CR Docs. [1] 82, 84, 107-08]. The Tenth Circuit affirmed his convictions on direct appeal, and the Supreme Court denied his petition for writ of certiorari. [CR Docs. 113-14, 140, 152-53].

Perkins filed his first § 2255 motion on October 15, 2010, contending ineffective assistance of counsel; that motion was denied with prejudice. [CR Docs, 144, 152-53]. Perkins filed this

[1] All citations to "CR Doc." Refer to documents filed in the criminal case: 1:07-cr-01010-KWR-1.

second motion on June 26, 2016, asserting that the 2015 ruling in *Johnson v. United States*, 576 U.S. 591 (2015) invalidated his convictions and sentence. [*See* Doc. 1; *cf*. CR Docs. 144]. The district court held that the 2016 petition was Perkins' second § 2255 motion and that it lacked jurisdiction. [Doc. 5, pp. 2-3]. In the interest of justice, the district court transferred the petition to the United States Court of Appeals for the Tenth Circuit. [*Id.*, p. 5].

Upon review, the Tenth Circuit asked Perkins to address implications of *United States v. Davis*, 139 S.Ct. 2319 (2019) and *United States v. Bowen*, 936 F.3d 1091 (10th Cir. 2019). [Doc. 9]. After briefing, the Tenth Circuit granted partial relief authorizing a second or subsequent petition "limited to challenges of his § 924(c) convictions and sentence and to the enhancement of his sentence under the ACCA." [Doc. 13, p. 4]. Perkins filed his successive petition on July 9, 2020. [Doc. 20]. The United States filed a response on July 30, 2020. [Doc. 21]. In reply, Perkins filed a supplemental brief on April 29, 2021. [Doc. 22].

Perkins was originally convicted of one count of Interference with Commerce by Threats or Violence in violation of 18 U.S.C. §§ 1151 and 1152 (Hobbs Act robbery), two counts of Discharging a Firearm During and in Relation to a Crime of Violence in violation of 18 U.S.C. § 924(c) (each predicated on the Hobbs Act robbery), and one count of being a Felon in Possession of Ammunition in violation of 18 U.S.C. §§ 922(g)(1)). [CR Docs. 82, 84, 107-08]. Perkins sentence for Felon in Possession of Ammunition sentence was enhanced under 18 U.S.C. § 924(e) due to prior convictions for armed robbery (firearm enhancement), conspiracy to committed armed robbery (firearm enhancement), aggravated battery (deadly weapon) and escape from jail. [CR Doc.2; Doc. 20, pp. 16-17, (citing PSR, p. 14)].

In this petition, Perkins raises three grounds for federal habeas relief. First, he argues that his Hobbs Act robbery conviction is invalid. [Doc. 20, pp. 9-15]. He next argues that his two §

924(c) convictions are invalid because the predicate crime of violence, Hobbs Act robbery, is no longer a crime of violence after *Davis*. [Doc. 20, pp. 15-16]. Then, citing *Johnson*, he challenges the predicate for his § 924(e) sentence enhancement: "armed robbery, conspiracy to commit armed robbery, and aggravated battery are not crimes of violence [sic "violent felonies"]." [Doc. 20, p. 16-17].

The United States responded, first by noting that the Tenth Circuit did not authorize Perkins to reargue his Hobbs Act robbery conviction. [Doc. 21, p. 8]. The United States next argues that Hobbs Act robbery is categorically a crime of violence under § 924(c)'s elements clause and thus unaffected by *Davis'* invalidation of the residual clause. [*Id.*, pp. 9-11]. Lastly, the United States argues that the predicate offenses for Perkins' § 924(e) enhancement are violent felonies even absent the unconstitutional residual clause. [*Id.*, pp. 11-14].

In Perkins' supplemental brief, he discusses recent cases from other circuits and an unpublished Tenth Circuit decision for the proposition that Hobbs Act robbery is not a "crime of violence" as defined in the United States Sentencing Guidelines § 4B1.2(a). [Doc. 22]; *see also United States v. Cuthbertson*, 833 F. App'x 727, 729 (10th Cir. 2020).

II. STANDARD OF REVIEW

Section 2255 provides:

> A prisoner in custody under a sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence.

28 U.S.C. § 2255(a).

III. ANALYSIS

a. Hobbs Act robbery conviction

Perkins was convicted of one count of Interference with Commerce by Threats or Violence in violation of 18 U.S.C. §§ 1151 and 1152 (Hobbs Act robbery). [CR Doc. 107]. His second or successive § 2255 petition begins with the argument that his Hobbs Act robbery conviction is invalid. [*See* Doc. 20, pp. 9-15]. The Tenth Circuit authorized the new petition "limited to challenges to his § 924(c) convictions and sentence and to the enhance of his sentence under the ACCA." [Doc. 13, p. 4]. The Tenth Circuit did not authorize another challenge to the Hobbs Act robbery conviction, and a district court does not have jurisdiction to address the merits of a second or successive § 2255 claim until the Tenth Circuit has granted the required authorization. *In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008) (per curiam), *see* 28 U.S.C. § 2255(h). Because this is a second or successive § 2255 petition, and the Tenth Circuit did not grant the required authorization, this Court does not have jurisdiction to address the merits of the Hobbs Act robbery challenge.

b. § 924(c) Convictions

Perkins was convicted of two counts of Discharging a Firearm During and in Relation to a Crime of Violence in violation of 18 U.S.C. § 924(c), the underlying crime of violence being Hobbs Act robbery. [CR Docs. 2, 107]. Perkins asserts that Hobbs Act robbery is no longer a crime of violence after *Davis*. [Doc. 20, p. 16]. His argument should be rejected.

For this purpose, the definition of "crime of violence" has two independent parts known as the "elements" clause and the "residual" clause:

> For purposes of this subsection the term 'crime of violence' means an offense that is a felony and ---
>
> (A) Has an element the use, attempted use, or threatened use of physical force against the person or property of another, or

> (B) That by its nature, involves 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). In *Davis*, the Supreme Court held that the residual clause, § 924(c)(3)(B), is unconstitutionally vague. 139 S.Ct. at 2336. The holding in *Davis* does not extend to the elements clause, § 924(c)(3)(A). *See United States v. Nguyen*, 834 F. App'x 791, 792 (10th Cir. 2021) (unpublished). It is settled law in the Tenth Circuit that Hobbs Act robbery is categorically a crime of violence under the elements clause of § 924(c)(3)(A). *See id.* (citing *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1065 (10th Cir. 2018)); *see also United States v. Tyree*, 757 F. App'x 704, 707 (10th Cir. 2018) (unpublished). Because Hobbs Act robbery is categorically a crime of violence under the elements clause, Perkins cannot obtain relief under *Davis*.

c. § 924(e) Sentence Enhancement

Perkins was convicted of one count of being a Felon Possession of Ammunition in violation of 18 U.S.C. §§ 922(g)(1); the sentence for that conviction was enhanced under 18 U.S.C. § 924(e). Perkins argues the sentence enhancement is invalid under *Johnson*. His argument should be rejected.

Under § 924(e), a person who violated § 922(g) faces a more severe punishment if he also has three or more previous convictions for a violent felony or a serious drug offense. *See* 18 U.S.C. § 924(e). For this purpose, a "violent felony" is defined by § 924(e)(2)(B) which, similar to § 924(c), contains containing independent "elements" and "residual" clauses:

> The term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, . . . that ---
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

18 U.S.C. § 924(e)(2)(B).

In *Johnson*, the Supreme Court struck down the residual clause language of § 924(e)(2)(B)(ii) as unconstitutionally vague. 576 U.S. at 593-606. However, the *Johnson* Court held that the remaining aspects of a violent felony were unaffected by its holding on the residual clause. *Id.* at 606.

Perkins' sentence for his Felon in Possession conviction was enhanced based on prior convictions for armed robbery (firearm enhancement) and conspiracy to committed armed robbery (firearm enhancement), aggravated battery (deadly weapon) and escape from jail. [Doc. 20, pp. 16-17 (citing PSR, p. 14)]. Perkins' argument does not establish entitlement to relief. He discusses *Johnson*, identifies his relevant prior convictions, then concludes "[f]or the reasons discussed above, armed robbery, conspiracy to commit armed robbery, and aggravated battery are not crimes of violence [sic]." [*Id.*]. Perkins makes no attempt to show that his predicate felonies do not have "as an element the use, attempted use, or threatened use of physical force against the person of another". 18 U.S.C. § 924(e)(2)(B)((i). Notably, Perkins was on notice that it is the elements clause rather than the residual clause that is determinative here, as the Probation Office reviewed Perkins' prior convictions after *Johnson* and "determined the defendant's predicate convictions for Armed Robbery (Firearm Enhancement); Armed Robbery (DW); and Aggravated Battery[] meet the definition of violent felony, without the use of the residual clause." [CR Doc. 159, p. 1].

However, the United States bears the burden of proving whether a prior conviction qualifies under § 924(e). *See United States v. Garcia*, 877 F.3d 944, 948 (10th Cir. 2017) (citing *United States v. Titties*, 852 F.3d 1257, 1272 n. 19 (10th Cir. 2017)). Therefore, I still analyze whether Perkins' prior convictions are violent felonies under § 924(e).

The United States submits that Perkins has at least two prior separate armed robbery convictions as well as a New Mexico aggravated battery conviction. [Doc. 21, p. 11 (citing PSR ¶

49, 50 and 53)]. Perkins does not dispute the existence of these prior convictions. In *United States v. Manzanares*, the Tenth Circuit held that a New Mexico armed robbery conviction satisfies the elements clause, § 924(e)(2)(B)(i). 956 F.3d 1220, 1226 (10th Cir. 2020). The *Manzanares* court also held that "[t]he district court's conclusion that [the petitioner's] conviction under [New Mexico's aggravated battery statute] satisfies the Elements Clause[, § 924(e)(2)(B)(i), was] not reasonably debatable." *Id.* at 1228. In an unpublished decision, the Tenth Circuit interpreted *Manzanares* to "[hold] that the New Mexico crime of aggravated battery is a violent felony for purposes of the ACCA[.]" *United States v. Ybarra*, 827 F. App'x 896, 899 (10th Cir. 2020) (unpublished).

Perkins has three or more prior convictions that meet the definition of violent felony without the use of the residual clause. Therefore, Perkins has failed to show he is entitled to relief under *Johnson*.

IV. RECOMMENDATION

For the above reasons, I **recommend** that the Court **DISMISS** Perkins' petition with prejudice. Because reasonable jurists would not reach a different result, I **further recommend** that a certificate of appealability be **DENIED**.

JERRY H. RITTER
UNITED STATES MAGISTRATE JUDGE

THE PARTIES ARE FURTHER NOTIFIED THAT WITHIN 14 DAYS OF SERVICE of a copy of these Proposed Findings and Recommended Disposition, they may file written objections with the Clerk of the District Court pursuant to 28 U.S.C. § 636(b)(1).

A party must file any objections with the Clerk of the District Court within the fourteen-day period if that party wants to have appellate review of the proposed findings and recommended disposition. If no objections are filed, no appellate review will be allowed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

HERBERT ISAAC PERKINS,

Petitioner,

v.

No. 1:16-cv-00714-KWR-JHR
Related to No. 1:07-cr-01010-KWR-1

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on the Proposed Findings and Recommended Dispositions ("PFRD") of U.S. Magistrate Judge Jerry H. Ritter [Doc. 23], entered at the undersigned's request pursuant to 28 U.S.C. § 636(b). [*See* Doc. 17]. In the PFRD, Magistrate Judge Ritter recommends that the Court dismiss Petitioner Herbert Isaac Perkins' Successive Motion Pursuant to 28 U.S.C. § 2255 with prejudice. [Doc. 23, p. 7]. Perkins timely objected. [Doc. 26]. Having considered the objections and pertinent authority, the Court **OVERRULES** the objections, **ADOPTS** the PFRD, and **DISMISSES** the petition **WITH PREJUDICE.**

I. BACKGROUND

Perkins was convicted of one count of Hobbs Act robbery, two counts of discharging a firearm during and in relation to a crime of violence, and one count of being a felon in possession of ammunition, and this Court sentenced him to a life term of imprisonment. [CR Docs. 82, 84, 107-08; *see* Doc. 21, pp. 3-4].[1] The Tenth Circuit affirmed the convictions, and the United States Supreme Court denied certiorari. [CR Docs. 113-14, 140, 152-53]. Perkins first filed a *pro se* §

[1] All citations to "CR Doc." refer to documents filed in the criminal case: 1:07-cr-01010-KWR-1. Judge John E. Conway sentenced Perkins on March 5, 2008. [*See* CR Docs. 107-08]. This case was reassigned to Judge Kea W. Riggs on January 6, 2020. [Doc. 12].

2255 petition in 2010 alleging ineffective assistance of counsel, which was denied with prejudice. [CR Docs. 144, 152-53].

Perkins then filed a petition on June 25, 2016, asserting that the 2015 ruling in *Johnson v. United States*, 576 U.S. 591 (2015) invalidated his convictions and sentence. [*See* Doc. 1; *cf.* CR Doc. 144]. The Court held this petition was second or successive and required circuit court authorization for review. [Doc. 5, pp. 2-3]. In the interest of justice, the Court transferred the petition to the Tenth Circuit. [*Id.*, p. 5]. After briefing, the Tenth Circuit granted partial relief authorizing a second or successive petition "limited to challenges of his § 924(c) convictions and sentence and to the enhancement of his sentence under the ACCA [Armed Career Criminal Act]." [Doc. 13, p. 4].

After Tenth Circuit's partial authorization, Perkins filed a successive petition on July 9, 2020. [Doc. 20]. After briefing, Magistrate Judge Ritter recommends that the Court dismiss the petition with prejudice because 1) the Tenth Circuit did not grant authorization to review the merits of the Hobbs Act robbery conviction challenge, 2) Hobbs Act robbery is categorically a crime of violence under the elements clause, § 924(c)(3)(A), making *Davis*[2] relief inapplicable, and 3) New Mexico armed robbery and aggravated battery convictions satisfy the elements clause of the ACCA, § 924(e)(2)(B)(ii), making *Johnson* relief inapplicable. [*See generally* Doc. 23].

II. PERKINS' OBJECTIONS

Perkins timely objected on November 23, 2021. [Doc. 26]. He first contends that this Court has jurisdiction to review his Hobbs Act robbery conviction. [*Id.*, p. 6]. Perkins says that the only part of his earlier petition that was not authorized was the challenge to his career offender sentence enhancement. [*Id.*, pp. 6-7]. Perkins additionally says that because the Tenth Circuit authorized

[2] *United States v. Davis*, 139 S.Ct. 2319 (2019).

him to challenge his § 924(c) convictions and because the § 924(c) convictions cannot stand if the underlying predicate conviction (Hobbs Act robbery conviction) is invalid, the validity of the underlying conviction is fairly before the Court. [*Id.*, p. 7].

"A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals." 28 U.S.C. § 2255(h). "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." § 2244(b)(3)(A). "A district court does not have jurisdiction to address the merits of a second or successive § 2255 . . . claim until [the Tenth Circuit] has granted the required authorization." *In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008) (citing *United States v. Nelson*, 465 F.3d 1145, 1148 (10th Cir. 2006)).

The Tenth Circuit's partial authorization does not contain any language authorizing review of the Hobbs Act robbery conviction. [*See* Doc. 13]. It explicitly states "[w]e grant Movant authorization to file a second or successive § 2255 motion in district court limited to challenges to his § 924(c) convictions and sentence and to the enhancement of his sentence under the ACCA." [*Id.*, p. 4]. Because the Tenth Circuit did not authorize the review of the Hobbs Act robbery conviction, this Court does not have jurisdiction to review it. Therefore, the Court overrules this objection.

Perkins challenges the characterization of Hobbs Act robbery as a "crime of violence" under 18 U.S.C. § 924(c), but acknowledges that *United States v. Melgar-Cabrera*, 892 F.3d 1053 (10th Cir. 2018) is controlling in its holding that Hobbs Act robbery satisfies the elements clause, § 924(c)(3)(A). Perkins now objects only to preserve the issue for review. [Doc. 26, p. 8].

18 U.S.C. § 924(c) mandates a distinct penalty for a person who uses or carries a firearm during and in relation to crimes of violence, one that must be imposed in addition to the punishment provided for the underlying violent crime. *Dean v. United States*, 137 S.Ct. 1170, 1174 (2017). A § 924(c) sentence is "in addition to" any other term of imprisonment imposed on the person, *i.e.*, run consecutively. § 924(c)(1)(D)(ii). The statute defines "crime of violence" through two independent alternatives known as the "elements" clause and the "residual" clause. § 924(c)(3). In 2019, the Supreme Court held that the residual clause, § 924(c)(3)(B), is unconstitutionally vague. *United States v. Davis*, 139 S.Ct. 2319, 2336 (2019). A § 924(c) conviction remains valid, however, if the underlying crime is categorically a crime of violence under the elements clause, § 924(c)(3)(A). *See United States v. Muskett*, 970 F.3d 1233, 1238 (10th Cir. 2020). The Tenth Circuit held that Hobbs Act robbery is categorically a crime of violence under the elements clause in *Melgar-Cabrera*, 892 F.3d at 1065.

District courts are bound to follow the precedential authority of their respective courts of appeals unless presented with a proper argument for modification of the precedent. *See United States v. Guillen*, 995 F.3d 1095, 1114 (10th Cir. 2021) ("[v]ertical stare decisis is absolute"); *Allen v. Cooper*, 140 S.Ct. 994, 1003 (2020) (citing *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)) (special justification needed to reverse a decision). Perkins presents no argument for modification of *Melgar-Cabrera*. Because *Melgar-Cabrera* is binding, and Perkins' § 924(c) convictions were predicated on his Hobbs Act robbery conviction, his § 924(c) convictions remain valid after *Davis*. Therefore, the Court overrules this objection.

18 U.S.C. § 924(e) (ACCA) enhances a sentence if a person also has three or more previous convictions for a violent felony. The statute defines "violent felony" through three independent parts known as the "elements" clause, the "enumerated" clause, and the "residual" clause. 18

U.S.C. § 924(e)(2)(B). In 2016, the Supreme Court held that the residual clause, the latter part of § 924(e)(2)(B)(ii), is unconstitutionally vague. *Johnson v. United States*, 576 U.S. 591, 593-606 (2016). A § 924(e) sentence enhancement remains valid if the person had three or more previous convictions that satisfy the remaining aspects of a violent felony, and Perkins acknowledges that *United States v. Manzanares*, 956 F.3d 1220 (10th Cir. 2020) held that convictions under NMSA 1978, § 30-16-2 (New Mexico armed robbery) and § 30-3-5(C) (New Mexico aggravated battery) satisfy the elements clause for a violent felony under the ACCA. [Doc. 26, p. 10].

Perkins presents no argument for modification of *Manzanares* but, as with his previous argument, now objects only to preserve the issue. [Doc. 26, p. 10]. As explained above, a district court in a circuit with controlling law is bound to follow the precedential authority unless presented with a proper argument for modification. Because *Manzanares* is binding, and Perkins' sentence was enhanced due to prior convictions of the same types of offenses that were at issue in *Manzanares*, his § 924(e) sentence enhancement remains valid after *Johnson*. Therefore, the Court overrules this objection.

III. CONCLUSION

For the above reasons, the Court **HEREBY**:

1) **OVERRULES** Perkins' objections [Doc. 26];

2) **ADOPTS** Magistrate Judge Ritter's PFRD [Doc. 23]; and

3) **DISMISSES** Perkins' Successive Motion Pursuant to 28 U.S.C. § 2255 [Doc. 20] **WITH PREJUDICE.**

IT IS SO ORDERED.

KEA W. RIGGS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

HERBERT ISAAC PERKINS,

Petitioner,

v.

No. 1:16-cv-00714-KWR-JHR
Related to No. 1:07-cr-01010-KWR-1

UNITED STATES OF AMERICA,

Respondent.

FINAL JUDGMENT

Pursuant to the Memorandum Opinion and Order (**Doc. 27**) entered on **March 21, 2022**, the Court enters this Final Judgment under Fed. R. Civ. P. 58, **DISMISSING** this action **WITH PREJUDICE.**

IT IS SO ORDERED.

KEA W. RIGGS
UNITED STATES DISTRICT JUDGE