[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12458-G

IN RE: WISSAM T. HAMMOUD,

Petitioner.

Application for Leave to File a Second or Successive
Motion to Vacate, Set Aside,
or Correct Sentence, 28 U.S.C. § 2255(h)

Before: WILLIAM PRYOR, JORDAN and HULL, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A), Wissam T. Hammoud has filed an application seeking an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his federal sentence, 28 U.S.C. § 2255. Such authorization may be granted only if this Court certifies that the second or successive motion contains a claim involving one of the following two circumstances:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." *Id.* § 2244(b)(3)(C); *see also Jordan v. Sec'y, Dep't of Corrs.*, 485 F.3d 1351, 1357-58 (11th Cir. 2007) (explaining that this Court's determination that an applicant has made a *prima facie* showing that the statutory criteria have been met is simply a threshold determination).

I. BACKGROUND

In 2004, Hammoud was charged by a federal grand jury with various crimes in a 13-count superseding indictment. In 2005, pursuant to a written plea agreement, Hammoud pleaded guilty to these four counts: (1) retaliating against a witness, in violation of 18 U.S.C. § 1513 (Count 1); (2) solicitation to commit murder, in violation of 18 U.S.C. § 373 (Count 3); (3) use of a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c) (Count 5); and (4) possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g) (Count 13). As to the § 924(c) firearm charge in Count 5, the plea agreement specified that Hammoud possessed a firearm during the solicitation crime charged in Count 3. The district court dismissed the remaining nine counts and sentenced Hammoud to a total imprisonment term of 240 months, consisting of (1) concurrent 180-month sentences as to Counts 1 (retaliation) and 3 (solicitation); (2) a concurrent 120-month sentence as to Count 13 (felon in possession); and (3) a consecutive 60-month sentence as to Count 5 (the § 924(c) offense).

In 2006, Hammoud filed a direct appeal challenging his guilty pleas as to Counts 1 and 13 and his total sentence. *See United States v. Hammoud*, 229 F. App'x 869, 871 (11th Cir. 2007). On appeal, this Court affirmed Hammoud's convictions and dismissed his sentencing claim based

on the sentence appeal waiver provision in his plea agreement. *Id.* at 877. In 2008, Hammoud filed his original § 2255 motion to vacate, set aside, or correct his sentence raising a single ineffective assistance of trial counsel claim, which the district court denied on the merits.

In 2018, Hammoud filed an application for leave to file a second or successive § 2255 motion with this Court, arguing, among other things, that § 924(c)(3)(B) was unconstitutional, in light of the new rule of constitutional law announced in *Johnson v. United States*, 576 U.S. __, 135 S. Ct. 2551 (2015), and *Sessions v. Dimaya*, 584 U.S. __, 138 S. Ct. 1204 (2018), which held, respectively, that the residual clauses in the Armed Career Criminal Act ("ACCA") and 18 U.S.C. § 16(b) were unconstitutionally vague. We denied Hammoud's 2018 application on the merits because, under our then-binding precedent in *Ovalles v. United States ("Ovalles II")*, 905 F.3d 1231, 1253 (11th Cir. 2018) (en banc), *abrogated by United States v. Davis*, 588 U.S. __, 139 S. Ct. 2319 (2019), and *In re Garrett*, 908 F.3d 686, 689 (11th Cir. 2018), *abrogated in part by Davis*, 588 U.S. __, 139 S. Ct. 2319, neither *Johnson* nor *Dimaya* could support a vagueness-based challenge to § 924(c)(3)(B).

II. DISCUSSION

In his present application, Hammoud contends that his § 924(c) conviction in Count 5 is no longer constitutionally valid. Specifically, Hammoud asserts that § 924(c)(3)(B)'s residual clause is unconstitutional, in light of the new rule of constitutional law set forth in *Davis*, *Dimaya*, and *Johnson*, and that his companion solicitation conviction in Count 3 could have qualified as a "crime of violence" only under § 924(c)'s now-defunct residual clause.[1]

[1] Hammoud's reliance on *Dimaya* and *Johnson* to support his § 924(c) challenge is misplaced, as those cases involved 18 U.S.C. § 16(b) and the ACCA, respectively, not § 924(c). Thus, Hammoud's present claim is best described as a *Davis* claim.

To determine whether Hammoud's proposed *Davis* claim meets the statutory criteria, we must first address three preliminary issues: (1) whether *Davis* announced a new rule of constitutional law; (2) if so, whether *Davis* has been made retroactively applicable to cases on collateral review by the Supreme Court; and (3) whether Hammoud's *Davis* claim is barred under our precedent in *In re Baptiste*, 828 F.3d 1337 (11th Cir. 2016). Only after addressing these issues may we consider the merits of Hammoud's claim.

A. New Rule of Constitutional Law

Briefly, in *Davis*, decided on June 24, 2019, the Supreme Court extended its holdings in *Johnson* and *Dimaya* to § 924(c) and held that § 924(c)(3)(B)'s residual clause, like the residual clauses in the ACCA and § 16(b), is unconstitutionally vague. *Davis*, 588 U.S. at __, 139 S. Ct. at 2336. In doing so, the Supreme Court resolved a circuit split, rejecting the position (advocated for by the government in *Davis* and adopted by this Court and two other federal circuit courts) that § 924(c)(3)(B)'s residual clause could be saved from unconstitutionality if read to encompass a conduct-specific, rather than a categorical, approach. *See id.* at __, __, 139 S. Ct. at 2325 & n.2, 2332-33. The *Davis* Court emphasized that there was no "material difference" between the language or scope of § 924(c)(3)(B) and the residual clauses invalidated in *Johnson* and *Dimaya*, and therefore concluded that § 924(c)(3)(B)'s residual clause must suffer the same fate. *See id.* at __, __, 139 S. Ct. at 2326, 2336.

The first question we must answer here is whether *Davis* announced a new rule of constitutional law. A "new rule of constitutional law," 28 U.S.C. § 2255(h)(2), applies retroactively to criminal cases that became final before the rule was announced only if that rule falls within one of two narrow exceptions: (1) "[n]ew substantive rules"; or (2) "a small set of

watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Schriro v. Summerlin*, 542 U.S. 348, 351-52, 124 S. Ct. 2519, 2522-23 (2004) (internal quotations and emphasis omitted); *see also Teague v. Lane*, 489 U.S. 288, 307-10, 109 S. Ct. 1060, 1073-75 (1989) (plurality opinion). The first exception, new substantive rules, includes "decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Schriro*, 542 U.S. at 351-52, 124 S. Ct. at 2522 (internal citations omitted). The first exception limits the application of new substantive constitutional rules to those that "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Id.* at 352, 124 S. Ct. at 2522-23 (internal quotations omitted); *see also Teague*, 489 U.S. at 311, 109 S. Ct. at 1075 (explaining that a new substantive rule applies retroactively if it "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" (internal quotations and citation omitted)).

The Supreme Court has explained that, for purposes of determining retroactivity, "a case announces a new rule when it breaks new ground or imposes a new obligation" on the government. *Teague*, 489 U.S. at 301, 109 S. Ct. at 1070. A rule is "new" if the result of the case announcing the rule "was not dictated by precedent existing at the time the defendant's conviction became final." *Id.* (emphasis omitted). A rule is not dictated by existing precedent where it would not have been "apparent to all reasonable jurists." *Lambrix v. Singletary*, 520 U.S. 518, 527-28, 117 S. Ct. 1517, 1525 (1997). The Supreme Court has noted that, even where a court applies an already existing rule, its decision may create a new rule by applying the existing rule in a new

setting, thereby extending the rule "in a manner that was not dictated by [prior] precedent." *Stringer v. Black*, 503 U.S. 222, 228, 112 S. Ct. 1130, 1135 (1992).

In *In re Rivero*, 797 F.3d 986, 989 (11th Cir. 2015), this Court held that *Johnson* announced a new substantive rule. This Court explained that "[t]he new rule announced in [*Johnson*] is substantive rather than procedural because it narrow[ed] the scope of [section] 924(e) [in the ACCA] by interpreting its terms, specifically, the term violent felony." *Id.* (internal quotations omitted). This Court further stated that the Supreme Court, in *Johnson*, "held that imposing an increased sentence under the residual clause of the [ACCA] violates the Constitution's guarantee of due process," or, in other words, "*Johnson* narrowed the class of people who are eligible for an increased sentence under the [ACCA]." *Id.* (internal quotations omitted). The Supreme Court later reached the same conclusion in *Welch v. United States*, 578 U.S. __, __, 136 S. Ct. 1257, 1264-65 (2016), and held that *Johnson* announced a new substantive rule.

We conclude that *Davis*, like *Johnson* before it, announced a new substantive rule. The rule announced in *Davis* is "substantive" because, just as *Johnson* narrowed the scope of the ACCA, *Davis* "narrow[ed] the scope of [§ 924(c)] by interpreting its terms, specifically, the term [crime of violence]." *See In re Rivero*, 797 F.3d at 989. Put another way, in striking down § 924(c)'s residual clause, *Davis* "narrowed the class of people who are eligible" to be convicted under § 924(c). *See id.* And the rule announced in *Davis* is also "new" because it extended *Johnson* and *Dimaya* to a new statute and context. The Supreme Court in *Davis* restricted for the first time the class of persons § 924(c) could punish and, thus, the government's ability to impose punishments on defendants under that statute. Moreover, the Supreme Court's grant of *certiorari* in *Davis* to resolve the circuit split on whether § 924(c)(3)(B) was unconstitutionally vague

illustrates that the rule in *Davis* was not necessarily "dictated by precedent," *see Stringer*, 503 U.S. at 228, 112 S. Ct. at 1135, or "apparent to all reasonable jurists," *see Lambrix*, 520 U.S. at 527-28, 117 S. Ct. at 1525.

B. Retroactivity of *Davis*

The second question we must answer is whether the Supreme Court has made *Davis* retroactive to cases on collateral review. Though our above discussion, concluding that *Davis* announced a new substantive rule, would seem to resolve this retroactivity question, *see Schriro*, 542 U.S. at 352, 124 S. Ct. at 2522-23 (explaining that new substantive rules apply retroactively on collateral review), it does not. In the context of a second or successive motion under § 2255(h)(2), it is not enough for a new decision to fall within one of the two narrow exceptions to the general rule of non-retroactivity. Rather, as § 2255(h)(2) explicitly provides, the new rule must have been "made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2255(h)(2). In *Tyler v. Cain*, the Supreme Court held that this requirement means that, for a new rule to be retroactive within the meaning of § 2255(h)(2), (1) the Supreme Court itself must have expressly held that the new rule is retroactive on collateral review, or (2) the Supreme Court's holdings in "[m]ultiple cases . . . [must] necessarily dictate retroactivity of the new rule." 533 U.S. 656, 662-64, 666, 121 S. Ct. 2478, 2483-84 (2001) (considering the equivalent statutory requirement for state prisoners under 28 U.S.C. § 2244(b)(2)(A)).

Because the Supreme Court in *Davis* did not expressly state that its holding in that case applies retroactively to cases on collateral review, we consider whether the retroactivity of *Davis*'s new rule is "necessarily dictate[d]" by the holdings of multiple cases, *see id.* at 666, 121 S. Ct. at 2484, and we conclude that it is. As noted above, the Supreme Court held in *Welch* that *Johnson*

announced a new substantive rule. *See Welch*, 578 U.S. at __, __, 136 S. Ct. at 1264-65, 1268. Specifically, the *Welch* Court determined that the new constitutional rule announced in *Johnson* was substantive because, by striking down the ACCA's residual clause, *Johnson* substantively altered the range of conduct or the class of persons the ACCA could punish. *Id*. As such, the Court determined that *Johnson*'s new rule fell within *Teague*'s first exception and, so, was retroactive. *See id.* at __, __, 136 S. Ct. 1264-65, 1268. Since the Supreme Court's decision in *Welch*, this Court has recognized that federal prisoners who can make a *prima facie* showing that they were previously sentenced in reliance on the ACCA's now-voided residual clause are entitled to file a second or successive § 2255 motion. *In re Thomas*, 823 F.3d 1345, 1348 (11th Cir. 2016).

The same rationale applies here. As we have already explained, by striking down § 924(c)(3)(B)'s residual clause, *Davis* altered the range of conduct and the class of persons that the § 924(c) statute can punish in the same manner that *Johnson* affected the ACCA. In other words, *Davis* announced a new substantive rule, and *Welch* tells us that a new rule such as the one announced in *Davis* applies retroactively to criminal cases that became final before the new substantive rule was announced. Consequently, for purposes of § 2255(h)(2), we conclude that, taken together, the Supreme Court's holdings in *Davis* and *Welch* "necessarily dictate" that *Davis* has been "made" retroactively applicable to criminal cases that became final before *Davis* was announced. *See Tyler*, 533 U.S. at 666, 121 S. Ct. at 2484.

C. *In re Baptiste* Bar

Hammoud's conviction became final on July 31, 2007, when the 90-day period for filing a petition for *certiorari* in the Supreme Court from his direct appeal expired. Having concluded that *Davis* announced a new substantive rule that applies retroactively to successive § 2255

movants like Hammoud, the third and final preliminary question we must confront, before addressing whether Hammoud has made a *prima facie* showing of a *Davis* claim, is whether his *Davis* claim is barred under our precedent in *In re Baptiste*. As we explain below, it is not.

In *In re Baptiste*, this Court held that 28 U.S.C. § 2244(b)(1), which prohibits state prisoners from presenting repeat claims in a successive § 2254 habeas corpus petition, likewise bars federal prisoners from raising claims in a successive § 2255 motion that were presented in a prior application. 828 F.3d at 1339-40. Later, this Court held that § 2244(b)(1), and by extension *In re Baptiste*, creates a jurisdictional bar to our consideration of claims that were raised and rejected in a prior successive application. *See In re Bradford*, 830 F.3d 1273, 1277-79 (11th Cir. 2016). A claim is the same for purposes of that jurisdictional bar "where the basic gravamen of the argument is the same, even where new supporting evidence or legal arguments are added." *In re Baptiste*, 828 F.3d at 1339.

Although the rationale underlying *Johnson* and *Dimaya* (on which Hammoud's prior, 2018 successive application was based) is the same rationale that underlies *Davis* (on which Hammoud's present application is premised), we conclude that *In re Baptiste* does not bar Hammoud's present *Davis*-based application. This is so because, as detailed above, *Davis* announced a new substantive rule of constitutional law in its own right, separate and apart from (albeit primarily based on) *Johnson* and *Dimaya*. Thus, Hammoud's present claim is a new *Davis* claim, not a *Johnson* or *Dimaya* claim, and is, therefore, not barred by *In re Baptiste*. *See In re Anderson*, 829 F.3d 1290, 1293 (11th Cir. 2016) (explaining, in denying a successive § 2255 movant's *Johnson*-based challenge to the career offender guidelines, that if the Supreme Court were to find the guidelines' residual clause void-for-vagueness in *Beckles v. United States*, 580 U.S. __, 137 S. Ct.

886 (2017), which was then pending, "Anderson will be able to file a new application seeking certification to file a second or successive § 2255 motion based not on *Johnson* but on *Beckles*"); *see also In re Bradford*, 830 F.3d at 1279 (reiterating that, if the Supreme Court voided the guidelines' residual clause "in *Beckles*, or some other decision," "Bradford will have a new claim under § 2255(h)(2) for which he can then file an application to file a second or successive § 2255 motion," and stating that such a claim "will not be a *Johnson/Welch* claim, but a *Beckles* claim" (emphasis omitted)).

D. Merits of Hammoud's *Davis* Claim

With all of these preliminary issues resolved, we come to the question whether Hammoud has made a *prima facie* showing as to his present *Davis* claim, in which he challenges his § 924(c) conviction for using a firearm during and in relation to the § 373 solicitation offense in Count 3. Hammoud contends that his predicate § 373 solicitation offense could have qualified only under § 924(c)'s now-defunct residual clause, and his § 924(c) conviction in Count 5 is therefore invalid. To be convicted under § 373, a defendant must solicit another person with the intent that the other person "engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another . . . and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct." 18 U.S.C. § 373(a). While the murder conduct Hammoud solicited met the elements clause in § 373 to establish the § 373 conviction in Count 3, Hammoud was charged with a separate § 924(c) firearm offense in Count 5 where the "solicitation" of that murder conduct must also qualify as a crime of violence under § 924(c)'s residual or elements clause.

Neither the Supreme Court nor this Court has addressed whether "solicitation" of another to commit murder, in violation of § 373, qualifies as a crime of violence under only the residual clause or the elements clause or both clauses of § 924(c)(3). So Hammoud has made a *prima facie* showing that his § 924(c) conviction in Count 5 may—not that it does, but it may—implicate § 924(c)'s residual clause and *Davis*. *See* 28 U.S.C. §§ 2244(b)(3)(C), 2255(h)(2); *Jordan*, 485 F.3d at 1357-58.

It is also important to note that our determination that Hammoud has made a *prima facie* showing that his § 924(c) conviction in Count 5 may implicate § 924(c)'s residual clause and *Davis* does not conclusively resolve the merits of that issue. *See In re Moore*, 830 F.3d 1268, 1271 (11th Cir. 2016); *Jordan*, 485 F.3d at 1357-58. The district court in the first instance shall proceed to consider the merits of Hammoud's § 2255 motion, along with any defenses and arguments the respondent may raise. *In re Moss*, 703 F.3d 1301, 1303 (11th Cir. 2013). Further, in the district court, Hammoud will bear the burden of showing that he is actually entitled to relief on his *Davis* claim, meaning he will have to show that his § 924(c) conviction resulted from application of solely the residual clause. *See In re Moore*, 830 F.3d at 1271-73; *see also Beeman v. United States*, 871 F.3d 1215, 1222-25 (11th Cir. 2017). Any determination that the district court makes about the merits of Hammoud's *Davis* claim is subject to review on appeal from a final judgment or order if an appeal is filed. *In re Moss*, 703 F.3d at 1303.

Finally, a "successive motion does not stand in the place of a first § 2255 motion, allowing the movant to raise any claim that would have been cognizable in an original § 2255 proceeding." *Solomon v. United States*, 911 F.3d 1356, 1360 (11th Cir. 2019), *abrogated on other grounds by Davis*, 588 U.S. __, 139 S. Ct. 2319, *cert. filed*, No. 18-9210 (U.S. May 9, 2019). Rather,

Hammoud's application is granted only as to his *Davis* claim challenging his § 924(c) firearm conviction in Count 5.

Accordingly, because Hammoud has made a *prima facie* showing of the existence at least one of the grounds set forth in 28 U.S.C. § 2255, his application for leave to file a second or successive motion is hereby GRANTED as to his *Davis* claim regarding his § 924(c) conviction in Count 5.