FILED
United States Court of Appeals
Tenth Circuit

June 27, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOEL S. ELLIOTT,

Defendant - Appellant.

No. 22-8046
(D.C. No. 1:20-CV-00101-SWS)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **McHUGH**, and **CARSON**, Circuit Judges.

Joel S. Elliott appeals the district court's dismissal of his second habeas corpus motion under 28 U.S.C. § 2255. This court authorized a second or successive motion under § 2255(h) only for a claim based on the new constitutional rule announced in *United States v. Davis*, 139 S. Ct. 2319, 2324 (2019), and the district court correctly determined *Davis* had no impact on Mr. Elliott's conviction under 18 U.S.C. § 924(c).

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

Because Mr. Elliott has failed to demonstrate that his § 2255 motion challenging his § 924(c) conviction relies on the new rule of constitutional law announced in *Davis*, we vacate the district court's denial of Mr. Elliott's second § 2255 motion and remand with instructions to enter an order dismissing Mr. Elliott's § 2255 motion for lack of jurisdiction.

I. PROCEDURAL BACKGROUND

A. Mr. Elliott's Initial Proceedings

In 2015, Mr. Elliott was charged with, among other offenses, "maliciously damag[ing] by means of fire and explosives" the Sheridan County Attorney's Office, in violation of 18 U.S.C. § 844(f)(1)–(2), which applies to arson of buildings receiving federal funds. ROA Vol. II at 1.[1] Mr. Elliott was also charged with knowingly using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A) and (b)(2), with his charge for federal arson under § 844(f)(1)–(2) serving as the predicate crime of violence. Section 924(c)(3) provides two definitions of crime of violence, in what are known as "the elements clause" and "the residual clause." *Davis*, 139 S. Ct. at 2324. Under the elements clause, a crime of violence is a felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). The residual clause defines a crime of violence as a felony offense that, "by its nature, involves a substantial risk that

[1] Because of inconsistency in the district court's bates stamped pagination, we refer to the PDF pagination of the record.

physical force against the person or property of another may be used in the course of committing the offense." *Id.* § 924(c)(3)(B).

Prior to trial, Mr. Elliott moved to dismiss his charge under § 924(c), arguing federal arson "categorically fail[ed] to qualify as a crime of violence within the meaning of 18 U.S.C. § 924(c)(3)(A) [(the elements clause)], and the residual clause of § 924(c)(3)(B) [wa]s unconstitutionally vague under *Johnson v. United States*, 135 S. Ct. 2551 (2015)." ROA Vol. II at 18. Addressing the elements clause, Mr. Elliott argued federal arson did not satisfy the definition of crime of violence because the offense required only a *mens rea* of acting "maliciously," which the Tenth Circuit had interpreted as "includ[ing] acts done 'intentionally or with willful disregard of the likelihood that damage or injury would result.'" *United States v. Wiktor*, 146 F.3d 815, 818 (10th Cir. 1998) (quoting *United States v. Gullett*, 75 F.3d 941, 947–48 (4th Cir. 1996)). Mr. Elliott pointed to decisions from other circuits, holding offenses that could be committed with a *mens rea* of recklessness did not satisfy the elements clause definition of crime of violence, and argued a federal arson conviction could therefore not satisfy the elements clause where it could be committed recklessly. Addressing the residual clause, Mr. Elliott argued that, following the Supreme Court's decision in *Johnson*, § 924(c)(3)'s residual clause was unconstitutionally vague. In *Johnson*, the Supreme Court held that the residual clause defining "violent felony" under the Armed Career Criminal Act ("ACCA"), as "any felony that 'involves conduct that presents a serious potential risk of physical injury to another,'" was unconstitutionally vague. *Johnson*, 576 U.S. at 593, 601 (quoting 18 U.S.C. § 924(e)(2)(B)). Mr. Elliott contended that, based on *Johnson*, § 924(c)(3)'s

residual clause was also unconstitutionally vague as it was "nearly identical" to the residual clause definition of violent felony under the ACCA. ROA Vol. II at 20.

Responding to Mr. Elliott's elements clause argument, the Government conceded that an offense that could be committed with a *mens rea* of recklessness could not constitute a crime of violence under § 924(c)(3)'s elements clause, citing this court's decision in *United States v. Zuniga-Soto*, 527 F.3d 1110, 1123–25 (10th Cir. 2008), holding reckless conduct could not satisfy the almost identical definition of crime of violence under 18 U.S.C. § 16. However, the Government argued this did not end the inquiry because, unlike the typical case applying the categorical approach retrospectively to prior convictions, Mr. Elliott had not yet been tried or convicted of federal arson. The Government contended the court could resolve the *mens rea* issue by treating the federal arson statute, § 844(f)(1)–(2), as a divisible statute under the modified categorical approach and directing the jury, if it found Mr. Elliott guilty of federal arson, to convict Mr. Elliott under § 924(c) only if it first determined beyond a reasonable doubt that Mr. Elliott had acted deliberately and intentionally. Addressing Mr. Elliott's residual clause argument, the Government claimed § 924(c)(3)'s residual clause was distinguishable from the ACCA's such that the Supreme Court's holding in *Johnson* did not necessitate holding § 924(c)(3)'s residual clause unconstitutionally vague.

In an oral ruling on Mr. Elliott's motion to dismiss, the trial court summarized Mr. Elliott's argument as stating a conviction for federal arson (1) is not categorically a crime of violence under the elements clause because an individual can be convicted of federal arson for reckless conduct and (2) could not be a crime of violence based on the

residual clause because that clause is unconstitutionally vague based on the Supreme Court's decision in *Johnson*. The trial court further acknowledged the Government's concession that federal arson based on reckless conduct could not be a crime of violence under the elements clause. Without discussing Mr. Elliott's argument that the residual clause was unconstitutionally vague, the trial court adopted the Government's proposal of asking the jury to determine whether Mr. Elliott acted intentionally and deliberately in committing federal arson. The trial court determined that, based on the Tenth Circuit's decision in *United States v. White*, 782 F.3d 1118, 1131 (10th Cir. 2015), "when courts are faced with divisible statutes, they can apply a modified, categorical approach under which they consider a limited class of documents such as indictments, jury instructions, plea agreements, and plea colloquies to determine which alternative formed the basis of defendant's conviction under a divisible statute." ROA Vol. V at 6. Next, the court concluded the federal arson statute's *mens rea* element was divisible and could be "satisfied by intentional conduct or reckless conduct." *Id.* at 7. Accordingly, the trial court determined it would instruct the jury, if it found Mr. Elliott guilty of federal arson, to determine unanimously whether Mr. Elliott acted intentionally and deliberately or recklessly. The court stated Mr. Elliott could be subject to a conviction under § 924(c) only if the jury found he committed federal arson intentionally and deliberately. The trial court recognized it "[wa]s not aware of a situation where this approach has been used," but that Mr. Elliott could seek review on appeal if needed. *Id.* at 8. Accordingly, the trial court denied Mr. Elliott's motion to dismiss.

The trial court then crafted jury instructions and a special verdict form to address the *mens rea* issue. The trial court instructed the jury that, to find Mr. Elliott guilty of federal arson, it must find unanimously, by proof beyond a reasonable doubt, that he acted "maliciously," that is, intentionally or with willful disregard. ROA Vol. II at 85–86. The court further instructed the jury that, to qualify as a crime of violence, federal arson must have been committed intentionally and deliberately. In accordance with these instructions, the verdict form first asked the jury to determine unanimously and beyond a reasonable doubt whether Mr. Elliott was guilty of "arson of a building owned by an organization receiving federal funds by means of fire and explosives, in violation of 18 U.S.C. § 844(f)(1) and (f)(2)." *Id.* at 62. If the jury found Mr. Elliott guilty of federal arson, the verdict form also asked the jury whether it "unanimously f[ound], by proof beyond a reasonable doubt, that the arson by means of fire and explosives as described in Count One was committed . . . [i]ntentionally and deliberately or [r]ecklessly." *Id.* at 63. The verdict form included blank spaces for the jury to check either "[i]ntentionally and deliberately" or "recklessly" and asked the jury to select only one. *Id.* The form then directed the jury, if and only if it determined Mr. Elliott acted intentionally and deliberately in committing federal arson, to determine whether Mr. Elliott was guilty of "use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A) and (B)(ii)." *Id*. The jury found Mr. Elliott guilty of federal arson, determined Mr. Elliott acted intentionally and deliberately, and found Mr. Elliott guilty of use of a firearm during and in relation to a crime of violence. The trial court sentenced

Mr. Elliott to a 444-month term of imprisonment, with 360 of those months accounting for the mandatory minimum sentence for Mr. Elliott's conviction under § 924(c).

Mr. Elliott appealed his conviction to this court, raising two challenges to his federal arson conviction. *See United States v. Elliott*, 684 F. App'x 685, 686 (10th Cir. 2017) (unpublished). Importantly, Mr. Elliott did not challenge the trial court's denial of his motion to dismiss his charge under § 924(c) or the trial court's decision to treat the federal arson statute as divisible and submit the *mens rea* question to the jury. *See id.* This court rejected Mr. Elliott's arguments and affirmed his conviction. *See id.* at 698.

B. Mr. Elliott's First § 2255 Motion

Mr. Elliott subsequently filed his first habeas corpus motion under 28 U.S.C. § 2255. Again, Mr. Elliott did not challenge the trial court's denial of his motion to dismiss his charge under § 924(c) or its reliance on the special verdict form to determine that his federal arson conviction was a crime of violence under § 924(c)(3). *See United States v. Elliott*, 753 F. App'x 624, 625–26 (10th Cir. 2018) (unpublished). The district court denied Mr. Elliott's motion and declined to issue a certificate of appealability ("COA"); this court also declined to issue a COA. *See id.* at 626, 627.

C. Mr. Elliott's Second § 2255 Motion

Mr. Elliott filed a motion in this court seeking authorization to file a second habeas corpus motion pursuant to § 2255(h), raising a claim, among others, that he was wrongfully convicted under § 924(c) based on *Davis,* in which the Supreme Court held that § 924(c)(3)'s residual clause defining crime of violence was unconstitutionally vague. *See Davis*, 139 S. Ct. at 2336. This court granted in-part Mr. Elliott's motion

seeking authorization to file a second § 2255 motion. *See* Order, *In re: Joel S. Elliott*, No. 20-8025 (10th Cir. June 8, 2020). Addressing only the gatekeeping requirements under § 2255(h), and not reaching the merits of Mr. Elliott's *Davis* claim, this court determined Mr. Elliott could bring a second § 2255 motion to challenge his § 924 conviction under *Davis* because "[t]he Supreme Court announced a new rule of constitutional law in *Davis* and . . . ha[d] made *Davis* retroactive to cases on collateral review."[2] *Id.* at 2. The panel directed the district court to treat Mr. Elliott's motion for authorization, to the extent it raised a *Davis* claim, as an authorized second § 2255 motion.

The district court did so but denied Mr. Elliott's second § 2255 motion on the merits. The court concluded that, even assuming the trial court had erred under *Davis*, any such error was harmless. The district court declined to issue another COA.

Mr. Elliott filed a pro se motion seeking a COA from this court, which we initially denied. *See United States v. Elliott*, No. 21-8016, 2021 WL 2947779 (10th Cir. July 14, 2021). But, while Mr. Elliott's request for a COA was pending, the Supreme Court decided *Borden v. United States*, 141 S. Ct. 1817, 1825 (2021), holding the ACCA's nearly-identical elements clause definition of crime of violence does not "include[] offenses criminalizing reckless conduct." *Borden*, 141 S. Ct. at 1825. Mr. Elliott petitioned for panel rehearing. *See United States v. Elliott*, No. 21-8016, 2021 WL 6110395, at *1 (10th Cir. Dec. 23, 2021). This court granted panel rehearing, vacated the

[2] This court denied Mr. Elliott authorization to file a second § 2255 motion with respect to his other claims, which were not based on (1) newly discovered evidence or (2) a new constitutional rule that applied retroactively.

previous order denying Mr. Elliott a COA, and remanded for the district court to reconsider Mr. Elliott's *Davis* claim in light of the Supreme Court's holding in *Borden*. *See id.*

D. Reconsideration of Mr. Elliott's Second § 2255 Motion

On remand, Mr. Elliott filed a supplemental brief explaining that his federal arson conviction was not a categorical match with § 924(c)(3)'s elements clause definition of crime of violence because federal arson requires only that an individual act with a *mens rea* of recklessness. Mr. Elliott argued *Borden*'s holding, that an offense allowing a *mens rea* of recklessness could not be a violent felony under the ACCA's elements clause, applied to § 924(c)(3) which used the same definition for crime of violence under its elements clause. Mr. Elliott requested that the district court vacate the portion of his sentence imposed based on his conviction under § 924(c).

The Government responded that Mr. Elliott's *Davis* claim necessarily fails because the trial court record demonstrates that Mr. Elliott's § 924(c) conviction was based on the elements clause, not the residual clause that *Davis* found unconstitutional. It asserted that the Supreme Court's holding in *Borden* does not change this analysis. Additionally, the Government argued Mr. Elliott's claim that federal arson is not a categorical match with the elements clause definition of crime of violence under § 924(c)(3), was procedurally barred and that no exception would allow Mr. Elliott to proceed with his separate *Borden* claim. According to the Government, even were the court to consider Mr. Elliott's *Borden* claim, the trial court did not apply § 924(c)(3) based on an understanding that reckless conduct would be a categorical match with the

elements clause of § 924(c)(3). Rather, the trial court required the jury to find Mr. Elliott acted intentionally and deliberately in committing federal arson, prior to convicting him under § 924(c). Accordingly, the Government contended the Supreme Court's holding in *Borden* had no impact on the trial court's decision to treat the federal arson statute as divisible, and to permit the jury to convict Mr. Elliott under § 924(c) only if he acted intentionally and deliberately. The Government explained that the only way *Borden* would be relevant to Mr. Elliott's conviction was if the court were to first determine the trial court erred in treating the federal arson statute as divisible. But because Mr. Elliott never raised such a claim, he was procedurally barred from raising it now.

The district court agreed with the Government, noting the trial court had based Mr. Elliott's § 924(c) conviction on the elements clause definition of crime of violence and so, "*Davis* has no application here." ROA Vol. I at 642. The district court further found that, in applying the elements clause, the trial court had understood that under then-current law reckless conduct likely would not warrant a conviction under § 924(c). The trial court accordingly required the jury to find Mr. Elliott acted deliberated and intentionally. The district court noted the trial court's approach was novel, but it determined Mr. Elliott had procedurally defaulted any challenge to this approach and could not meet the requirements for excusing a procedural bar. Recognizing that reasonable jurists may disagree with its resolution of Mr. Elliott's second § 2255 motion, the district court granted a COA encompassing the entirety of its order. This appeal followed.

II. STANDARD OF REVIEW & LEGAL BACKGROUND

A. Habeas Corpus Motions Under 28 U.S.C. § 2255

We review a district court's denial of a motion under 28 U.S.C. § 2255 de novo, "unless the court conducted an evidentiary hearing from which it made findings." *United States v. Copeland*, 921 F.3d 1233, 1242 (10th Cir. 2019). Pursuant to § 2255(a), a federal prisoner "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 . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). But if a federal prisoner is filing a "second or successive motion under § 2255," he must "obtain an order from the appropriate court of appeals authorizing the district court to consider the motion." *In re Cline*, 531 F.3d 1249, 1250 (10th Cir. 2008) (per curiam); *see* 28 U.S.C. §§ 2244(b)(3), 2255(h). To obtain authorization, the movant must make "a prima facie showing to the court of appeals that the motion satisfies the requirements of § 2255(h)[.]" *United States v. Murphy*, 887 F.3d 1064, 1068 (10th Cir. 2018). Pursuant to § 2255(h), the court of appeals may authorize such a second or successive § 2255 motion under two circumstances. *See* 28 U.S.C. § 2255(h). As relevant to this appeal, one such circumstance is met when the motion contains "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.* § 2255(h)(2). "A motion contains a new rule of constitutional law, as required by § 2255(h)(2), if the claim for which authorization is sought relies on the new rule." *Murphy*, 887 F.3d at 1067 (internal quotation marks omitted). Once a movant obtains authorization from the court of appeals, the district court

must then determine whether "the petition does, in fact, satisfy th[e] requirements" of § 2255(h) before proceeding to consider the § 2255 motion on its merits. *Id.* at 1068. Importantly, § 2255(h)'s gatekeeping requirements for second or successive habeas corpus motions are jurisdictional in nature. *See United States v. Harrison*, 785 F. App'x 534, 536 (10th Cir. 2019) (unpublished)[3] (citing *Case v. Hatch*, 731 F.3d 1015, 1027 (10th Cir. 2013) (holding "[s]ection 2244's gate[]keeping requirements are jurisdictional in nature, and must be considered prior to the merits of a § 2254 petition."); *Murphy*, 887 F.3d at 1068 (concluding § 2244's gatekeeping requirements apply to second or successive § 2255 motions)).

B. Davis Error Analysis

A movant filing a second or successive § 2255 motion challenging his conviction under *Davis*, must first pass the jurisdictional gatekeeping requirements of § 2255(h). That is, he must make out a prima facia case to this court that his challenge relies on *Davis* and then prove to the district court that his motion does in fact rely on the new rule of constitutional law announced in *Davis*. *Murphy*, 877 F.3d at 1068. In *Davis*, in 2019, the Supreme Court held the residual clause of § 924(c) unconstitutionally vague, leaving only the elements clause to define a crime of violence. *Id.* at 2336. Thus, if a federal prisoner's § 924(c) conviction necessarily relied on the residual clause, the conviction was in error under *Davis*. *See United States v. Bowen*, 936 F.3d 1091, 1109 (10th Cir.

[3] Although not precedential, we find the reasoning of this court's unpublished decisions instructive. *See* 10th Cir. R. 32.1(A) ("Unpublished decisions are not precedential, but may be cited for their persuasive value."); *see also* Fed. R. App. P. 32.1.

2019) (concluding defendant's § 924(c) conviction was an error because it relied on the residual clause to define the predicate offense as a crime of violence).

A § 2255 movant claiming his conviction was erroneous under *Davis* "bears the burden of proving by a preponderance of the evidence that it was use of the residual clause that led to" his conviction under § 924(c). *Copeland*, 921 F.3d at 1242 (internal quotation marks omitted). This court employs a two-step test to determine whether the district court relied on the residual clause.[4] First, we look to the trial court record "to confirm that there is no mention whatsoever of the residual clause in the . . . court pleadings or transcripts[.]" *United States v. Driscoll*, 892 F.3d 1127, 1132 (10th Cir. 2018) (internal quotation marks and brackets omitted). Second, if the record is silent or ambiguous about whether the trial court relied on the elements clause or the residual clause, we look to "the relevant background legal environment at the time of [conviction] to determine whether the district court would have needed to rely on the residual clause." *Id.* (internal quotation marks omitted); *see also Bowen*, 936 F.3d at 1108–09 (applying two-part test to determine whether defendant's § 924(c)(1)(A)(ii) conviction relied on the

[4] This two-step test was originally articulated in the context of § 2255 movants' claims under *Johnson v. United States*, 576 U.S. 591 (2015), which held the similar residual clause of the ACCA's definition of "violent felony" unconstitutionally vague. *See United States v. Snyder*, 871 F.3d 1122, 1128–30 (10th Cir. 2017); *United States v. Driscoll*, 892 F.3d 1127, 1132–35 (10th Cir. 2018); *United States v. Copeland*, 921 F.3d 1233, 1242–44 (10th Cir. 2019). Given the similar functional effects of *Johnson* and *United States v. Davis*, 139 S. Ct. 2319 (2019), and because claims under both similarly require determining whether the trial court relied on the residual clause, we have since applied the same test to claims under *Davis*. *See United States v. Bowen*, 936 F.3d 1091, 1108–09 (10th Cir. 2019).

residual clause). But "[i]t may not be necessary to consult background law if the [] record unambiguously shows the court relied on a clause other than the residual clause because background law is only useful insofar as it helps to show the most likely reasoning of the [trial] court." *Copeland*, 921 F.3d at 1242–43 (internal quotation marks omitted); *see also Driscoll*, 892 F.3d at 1132 n.2 (noting the possibility that the record reveals the court "unambiguously relied on a clause other than the residual clause" and that in such circumstances it might not be necessary to proceed to the second step). In reviewing a district court's finding that the movant's conviction was not based on the residual clause, "we review the factual determinations about the [] record for clear error and the legal conclusions about the relevant background legal environment de novo." *Driscoll*, 892 F.3d at 1132–33.[5]

[5] If the § 2255 movant does show his § 924(c) conviction was erroneous under *Davis*, then the burden shifts to the government to prove such error was harmless. *See United States v. Lewis*, 904 F.3d 867, 873 (10th Cir. 2018) (applying harmless error analysis to § 2255 movant's *Johnson* claim); *see also Bowen*, 936 F.3d at 1109 (applying harmless error analysis to § 2255 movant's *Davis* claim). A *Davis* error is harmless only if the government can prove the predicate offense for the movant's § 924(c) conviction qualifies as a crime of violence under the elements clause, without reliance on the invalidated residual clause. *See United States v. Lozado*, 968 F.3d 1145, 1149 (10th Cir. 2020) (describing the same analysis within the context of a § 2255 movant's *Johnson* claim). In contrast to our determination of whether, as a matter of historical fact, the movant's conviction relied on the residual clause, our analysis of whether such reliance was harmless occurs under current law. *See Lewis*, 904 F.3d at 872–73 (discussing the reason for applying current law in this court's harmless error analysis, after having found a *Johnson* error).

III. DISCUSSION

A. Mr. Elliott's Davis Claim

Mr. Elliott argues the district court erred in denying his second § 2255 motion on reconsideration because it "mischaracterized [his] *Davis* claim as something other than a *Davis* claim" and, based on that mischaracterization, "erroneously held that [his] second or successive § 2255 motion was procedurally barred." Appellant's Br. at 13. Mr. Elliott frames the question presented by his second § 2255 motion as whether his "conviction under § 924(c) for using a destructive devise [sic] during and in relation to a federal crime of violence can be sustained notwithstanding *Davis*." *Id.* at 15 (quoting App. Vol. I at 142). Acknowledging this court granted him authorization to file a second § 2255 motion only to the extent he sought to raise a *Davis* claim, Mr. Elliott contends the district court erred by failing to "consider whether *Borden* impacts its initial decision that any *Davis* error in this case was harmless." *Id.* at 14. In other words, Mr. Elliott argues the district court must consider whether his federal arson conviction "qualifies as a crime of violence, under current law, in the absence of § 924(c)[(3)]'s residual clause." *Id.* at 14.

The Government responds that the district court correctly concluded *Davis* does not apply to Mr. Elliott's § 924(c) conviction because that conviction explicitly relied on the elements clause. Therefore, because Mr. Elliott's second § 2255 motion does not rely on *Davis*, the Government contends there is no jurisdiction to reach the merits of Mr. Elliott's claims.

As Mr. Elliott acknowledges, this court granted him authorization to file a second § 2255 motion only to the extent he sought to challenge his § 924(c) conviction under *Davis*. To determine whether Mr. Elliott's § 924(c) conviction was erroneous under *Davis*, a habeas court first looks to the trial court record to determine whether the movant's conviction unequivocally relied on § 924(c)(3)'s elements clause or the now-invalidated residual clause. *See Driscoll*, 892 F.3d at 1132. In denying Mr. Elliott's second § 2255 motion, the district court found Mr. Elliott's § 924(c) conviction "was expressly based on § 924(c)[(3)]'s elements clause, so *Davis* has no application here." ROA Vol. I at 642. That finding was not clearly erroneous. *See Driscoll*, 892 F.3d at 1132–33 ("[W]e review the factual determinations about the [] record for clear error[.]").

In its oral ruling denying Mr. Elliott's motion to dismiss the § 924(c) charge against him, the trial court explicitly considered federal arson a predicate crime of violence under the elements clause. The court outlined Mr. Elliott's arguments as twofold: (1) arson could not qualify as a crime of violence under the elements clause because the federal arson statute does not require intentional conduct but rather may be violated by a defendant acting with a *mens rea* of recklessness; and (2) arson could not qualify as a crime of violence under the residual clause because that clause should be held unconstitutionally vague, as suggested by the Supreme Court's holding in *Johnson*, 135 S. Ct. 2551. The trial court made no analysis or ruling on Mr. Elliott's *Johnson* argument concerning the residual clause. Rather, the court applied the modified categorical approach to conclude federal arson could qualify as a crime of violence under the elements clause if the jury found, unanimously and beyond a reasonable doubt, that

Mr. Elliott had acted intentionally and deliberately. Accordingly, the court instructed the jury that federal arson was a crime of violence only if done intentionally and deliberately. Further, the verdict form required the jury, if it concluded Mr. Elliott was guilty of federal arson, to indicate whether it unanimously found, by proof beyond a reasonable doubt, that Mr. Elliott acted intentionally and deliberately or recklessly. The jury was instructed to proceed to the question of whether Mr. Elliott used a firearm in relation to a crime of violence only if it found he had committed arson intentionally and deliberately. The court's application of the modified categorical approach, and its use of the jury instructions and verdict form in doing so,[6] allowed it to focus the inquiry on the elements clause and to avoid entirely Mr. Elliott's residual clause argument. Because Mr. Elliott has not proved that his § 924(c) conviction was more-likely-than-not based on the now-invalidated residual clause, he has not met his burden of proving that his conviction was erroneous under *Davis*.

Mr. Elliott has failed to demonstrate his § 2255 motion does, in fact, rely on the new rule of constitutional law announced in *Davis.* Therefore, he has not satisfied the jurisdictional requirements of § 2255(h). Having concluded the trial court unequivocally relied on the elements clause to classify arson as a crime of violence, we need not look to

[6] We express no opinion endorsing the trial court's application of the modified categorical approach in this instance or its use of the jury instructions and verdict form as part of that application. Our present review considers the trial court record only to ascertain whether the court unambiguously relied on the residual clause or the elements clause in determining whether federal arson qualified as a crime of violence under § 924(c)(3).

the legal background at the time of Mr. Elliott's conviction to ascertain the trial court's most likely reasoning. *Copeland*, 921 F.3d at 1242–43. Moreover, where Mr. Elliott's § 924(c) conviction was not erroneous under *Davis*, we do not consider harmless error.

Contrary to Mr. Elliott's contention, *Borden* plays no role in our initial determination of whether Mr. Elliott's § 924(c) conviction was based on a *Davis* error. *Cf. United States v. Snyder*, 871 F.3d 1122, 1130 (10th Cir. 2017) (noting that movant's § 2255 motion focused primarily on the applicability of the enumerated crimes clause of the ACCA and asserted a claim that his predicate offense did not qualify under that clause, rather than that it was erroneously considered under the residual clause invalidated by *Johnson*). Our *Davis* error analysis looks to the trial court record and, if that record is silent or ambiguous as to whether a § 2255 movant's conviction relied on the residual or elements clause, the relevant law as existed *at the time of conviction*. Mr. Elliott was convicted and sentenced in 2015. The Supreme Court decided *Borden* in 2021. *See Borden*, 141 S. Ct. at 1817. Thus, even were the record silent or ambiguous as to whether Mr. Elliott's § 924(c) conviction was based on the elements or residual clause, *Borden* would not play a role in our consideration of the trial court's most likely reasoning under the relevant law at the time of his conviction. *See United States v. Lewis*, 904 F.3d 867, 872 (10th Cir. 2018) ("The applicability of . . . post-sentencing law depends on the stage of *Johnson* review that the court is undertaking.").

The trial court record unambiguously reveals that the court relied on the elements clause of § 924(c)(3) in considering whether federal arson qualified as a crime of violence. Thus, Mr. Elliott's § 924(c) conviction is not erroneous under *Davis*. We

authorized Mr. Elliott to file a second § 2255 motion only to the extent he asserted a claim based on *United States v. Davis*. In granting a COA and remanding, we asked the district court to consider whether *Borden* impacted its original decision on Mr. Elliott's *Davis* claim. But ultimately, *Borden* has no impact on this underlying issue—whether Mr. Elliott's § 924(c) conviction was erroneous under the new constitutional rule announced in *Davis.* Mr. Elliott has failed to satisfy the gatekeeping requirements of § 2255(h) because he has not demonstrated that his § 924(c) conviction relied on the residual clause held unconstitutional in *Davis*. Accordingly, we vacate the district court's dismissal of Mr. Elliott's second § 2255 motion and remand with instructions to dismiss Mr. Elliott's motion for lack of jurisdiction.

B. Mr. Elliott's Other Claims

To the extent Mr. Elliott attempts to raise other challenges to his conviction that are not based on *Davis*, such claims fall outside the authorization granted by this court under § 2255(h). Before bringing a second or successive § 2255 motion, Mr. Elliott must receive authorization from this court. *See In re Cline*, 531 F.3d at 1250. This court has not granted authorization for Mr. Elliott to bring a successive § 2255 motion, apart from a claim that his § 924(c) conviction was erroneous under *Davis*. As such, this court and the district court lack jurisdiction to consider any other alleged errors.[7]

[7] Having found we and the district court lack jurisdiction to consider any claims outside of Mr. Elliott's *Davis* claim, we do not consider whether any such claims were procedurally defaulted.

Furthermore, even were Mr. Elliott to request authorization from this court to file a successive § 2255 motion claiming his conviction was erroneous under *Borden*, we could not authorize such a motion because *Borden* did not announce a new rule of constitutional law as required by § 2255(h)(2).[8] *See Jones v. United States*, 36 F.4th 974, 986 (9th Cir. 2022) ("*Borden* did not announce a new 'constitutional' rule."); *United States v. Hanner*, 32 F.4th 430, 436 (5th Cir. 2022) ("*Borden* 'did not announce a new rule of constitutional law but instead addressed a question of statutory construction.'" (quoting *In re Rodriguez*, 18 F.4th 841 (5th Cir. 2021))). As the Supreme Court recently reiterated, "§ 2255(h) specifies the two circumstances in which a second or successive collateral attack on a federal sentence is available, and those circumstances do not include an intervening change in statutory interpretation." *Jones v. Hendrix*, 599 U.S. -- at 23 (2023) (slip opinion). In *Borden*, the Supreme Court engaged in pure statutory construction, interpreting the elements clause phrase "against another," as used to modify "use of force," to "demand[] that the perpetrator direct his action at, or target, another individual." *Borden*, 141 S. Ct. at 1825. The Court determined that reckless conduct "is not aimed in that prescribed manner" and thus could not be included within the elements clause definition of violent felony. *Id.* Because *Borden* addressed a question of statutory interpretation, rather than a new rule of constitutional law, we do not consider Mr. Elliott's argument that, if charged today, his predicate offense of federal arson would not

[8] Mr. Elliott makes no assertion that "newly discovered evidence" proves that "no reasonable factfinder" would have found him guilty under § 924(c), as required for us to authorize a successive § 2255 motion under 28 U.S.C. § 2255(h)(1).

qualify as a crime of violence pursuant to *Borden*. To the extent the district court considered Mr. Elliott's claim that the trial court erred according to *Borden*, we vacate the district court's order and remand with instructions to enter an order dismissing Mr. Elliott's *Borden* claim for lack of jurisdiction.

IV. CONCLUSION

For the reasons described herein, we VACATE the district court's order denying Mr. Elliott's second § 2255 motion, and REMAND with instructions to dismiss Mr. Elliott's second § 2255 motion for lack of jurisdiction.

Entered for the Court

Carolyn B. McHugh
Circuit Judge