

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 19-8007

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

FRANKLIN JOSEPH RYLE,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING
THE HONORABLE JUDGE ALAN B. JOHNSON
D.C. NOS. 2:17-CV-141-ABJ, 2:09-CR-124-CAB-1

UNITED STATES' UNOPPOSED MOTION TO VACATE DISTRICT COURT
ORDER AND JUDGMENT AND TO REMAND WITH DIRECTIONS
TO GRANT APPELLANT'S REQUESTED RELIEF

Appellant Franklin Joseph Ryle filed an opening brief on May 2, 2019, requesting that this Court issue a certificate of appealability (COA) allowing him to appeal the district court's order denying as untimely his amended motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. This motion sought, in part, to set aside Ryle's 60-month sentence for using or carrying a gun during and in relation to a crime of violence in violation of 18 U.S.C. 924(c)(1)(A), on the ground that 18 U.S.C. 924(c)(3)(B), which provides the applicable

definition of crime of violence, is unconstitutionally vague. Doc. 17, at 20-25. After the Supreme Court issued its decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), invalidating Section 924(c)(3)(B) as unconstitutionally vague, a single judge of this Court granted Ryle's request for a COA on his motion's timeliness and the merits and ordered the United States to file a response brief. Because *Davis* retroactively applies to cases on collateral review, the United States respectfully moves this Court under Tenth Circuit Rules 27.3(A)(1)(b) and (c) to summarily vacate the district court's order and final judgment and to remand this case to that court with directions to grant Ryle's requested relief with respect to his sentence under Section 924(c)(1)(A).¹

BACKGROUND

In July 2009, Ryle, a former Wyoming Highway Patrol Trooper, pleaded guilty to violating 18 U.S.C. 242 (deprivation of rights under color of law) and 924(c)(1)(A) (use of a firearm during and in relation to a crime of violence), arising out of his unlawful arrest and kidnapping of a Wal-Mart truck driver. In November 2009, the district court sentenced Ryle to 121 months' imprisonment for his Section 242 conviction, followed by a consecutive sentence of 60 months'

¹ Ryle's counsel has been informed of the United States' intent to file this motion and does not oppose the motion.

imprisonment for his Section 924(c) conviction. Crim. Doc. 70.² Ryle did not appeal, and his convictions became final in December 2009. See *United States v. Prows*, 448 F.3d 1223, 1227-1228 (10th Cir. 2006) (“If the defendant does not file an appeal, the criminal conviction becomes final upon the expiration of the time in which to take a direct criminal appeal.”); Fed. R. App. P. 4(b)(1)(A) (2008) (under pre-2009 Amendments, requiring notice of criminal appeal to be filed within ten business days of entry of judgment).

In August 2017, nearly eight years after his judgment of convictions became final, Ryle filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. Doc. 1. Citing a district court opinion from the Northern District of California, this motion challenged as unconstitutionally vague 18 U.S.C. 924(c)(3)(B), which defines “crime of violence” as a felony “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.” Doc. 1, at 30-32 (emphasis and citation omitted). The district court issued an order denying and dismissing Ryle’s motion as time barred under 28 U.S.C. 2255(f) without addressing the merits of his arguments. Doc. 9, at 4-14. The district court

² “Doc. __, at __” refers to the document number assigned on the district court’s docket sheet. “Crim. Doc. __, at __” refers to the document number assigned on the district court’s docket sheet for Ryle’s criminal case, No. 09-cr-124.

mentioned the “notable legal developments” in the “crime of violence case law” that occurred while Ryle’s motion was pending, in particular the Supreme Court’s decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), which held that 18 U.S.C. 16(b) was unconstitutionally vague, and this Court’s ruling in *United States v. Salas*, 889 F.3d 681 (10th Cir. 2018), cert. denied, No. 18-428, 2019 WL 2649895 (June 28, 2019), which applied *Dimaya* to invalidate Section 924(c)(3)(B) as unconstitutionally vague. Doc. 9, at 12. The district court nevertheless concluded that this Court’s precedent limited it to considering the right Ryle asserted, and that, as written, the petition was untimely because it asserted a right recognized only by the Northern District of California. Doc. 9, at 13.

In July 2018, with leave from the district court (Docs. 11, 13), Ryle filed an amended motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. Docs. 16-17. Ryle asserted that his amended motion was timely under 28 U.S.C. 2255(f)(3), which gives him one year to file from the date the Supreme Court “newly recognized” a right that is “retroactively applicable to cases on collateral review,” because the motion was filed within one year of the Supreme Court’s *Dimaya* decision. Doc. 17, at 16-20 (citation omitted). He further contended, among other grounds for relief, that the district court should vacate his 60-month sentence for his Section 924(c) conviction because the only definition of a “crime of violence” applicable to his conduct is 18 U.S.C. 924(c)(3)(B), which this Court

determined to be unconstitutionally vague in *Salas*. Doc. 17, at 18-19, 25. The district court again denied and dismissed Ryle's amended Section 2255 motion as untimely under Section 2255(f) because *Dimaya* did not recognize the right Ryle asserted. Doc. 26, at 8-14. Thus, the court concluded that Ryle's amended motion was filed too early, before the Supreme Court had recognized a right finding Section 924(c)(3)(B) unconstitutionally vague. Doc. 26, at 12-14. The district court also denied Ryle's request for a COA. Doc. 26, at 14-15.

Ryle filed a notice of appeal from the district court's order and final judgment. Doc. 28. In his opening brief filed in this Court, Ryle requested a COA to allow him to prosecute this appeal. See 28 U.S.C. 2253(c)(1)(B); Ryle May 2, 2019, Brief. While Ryle's request for a COA was pending, the Supreme Court issued its decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), holding that 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. This Court then entered an order granting Ryle's request for a COA on the issues of (1) whether his amended motion is timely under 28 U.S.C. 2255(f), and (2) if the amended motion is timely, whether his Section 924(c)(1)(A) conviction should be set aside based on Section 924(c)(3)(B)'s unconstitutionality. June 25, 2019, Order. This order also directed the United States to file a response brief by July 25, 2019. June 25, 2019, Order 2.

DISCUSSION

Ryle is entitled to relief under the Supreme Court’s recent decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), which held Section 924(c)(3)(B) to be unconstitutionally vague. *Id.* at 2325-2336. *Davis* announced a new substantive rule retroactively applicable to Ryle’s collateral challenge to his sentence under Section 924(c)(1)(A)—*i.e.*, a supervening change of law. Although the district court correctly ruled that Ryle’s amended Section 2255 motion based on *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) was not timely under Section 2255(f)(3) when it was filed, the United States elects to waive this limitations defense in the interest of justice. Accordingly, under Tenth Circuit Rules 27.3(A)(1)(b) and (c), the United States respectfully moves this Court to summarily vacate the district court’s order and final judgment, and to remand the case to that court with directions to grant Ryle’s requested relief with respect to his sentence under Section 924(c)(1)(A), in accordance with *Davis*.³

³ Tenth Circuit Rule 27.3(A)(1)(b) provides that a party may file a “motion for summary disposition because of a supervening change of law or mootness.” Tenth Circuit Rule 27.3(A)(1)(c) states that a party may file a “motion to remand for additional trial court or administrative proceedings.” Tenth Circuit Rule 27.3(A)(3)(a) further requires that a motion based on these grounds be filed “within 14 days after the notice of appeal is filed, unless good cause is shown.” The recency of the Supreme Court’s dispositive decision in *Davis*, which led to the grant of Ryle’s request for a COA, constitutes good cause. Under Tenth Circuit Rule 27.3(C), the filing of this motion suspends the briefing schedule.

A. *The Supreme Court’s Davis Decision Announced A New Substantive Rule That Retroactively Applies To Ryle’s Collateral Challenge To His Sentence Under Section 924(c)(1)(A)*

Before the Supreme Court’s decision in *Davis*, the Court had not yet recognized the right Ryle asserted in his amended Section 2255 motion—that 18 U.S.C. 924(c)(3)’s residual clause, 18 U.S.C. 924(c)(3)(B), is unconstitutionally vague. In light of this omission, the district court correctly concluded that Ryle’s motion based on *Dimaya*, which invalidated the similarly worded 18 U.S.C. 16(b), was untimely as filed too early. See Doc. 26, at 12-14.⁴

In *Davis*, the Supreme Court recognized the right Ryle asserts, holding that Section 924(c)(3)(B), which defines a “crime of violence” as a felony offense “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,” is unconstitutionally vague. 139 S. Ct. at 2324-2336. The Court first observed that *United States v. Johnson*, 135 S. Ct. 2551 (2015), and *Dimaya* invalidated as unconstitutionally vague the similarly worded residual clauses of 18 U.S.C.

⁴ This Court’s decision in *United States v. Salas*, 889 F.3d 681 (10th Cir. 2018), cert. denied, No. 18-428, 2019 WL 2649895 (June 28, 2019), which applied the Supreme Court’s reasoning in *Dimaya* to hold that Section 924(c)(3)(B) was unconstitutionally vague, 889 F.3d at 684-686, was not yet final at the time the district court denied Ryle’s amended Section 2255 motion. The government’s petition for writ of certiorari from that decision was then pending before the Supreme Court. See Petition for Writ of Certiorari, *United States v. Salas*, No. 18-428 (filed Oct. 3, 2018).

924(e)(2)(B) and 18 U.S.C. 16, respectively, under the categorical approach, which requires courts “to imagine the idealized ordinary case of the defendant’s crime.”

Davis, 139 S. Ct. at 2325-2326 (citation and internal quotation marks omitted).

The Court then determined that Section 924(c)(3)(B) “must be held unconstitutional too” if it “require[s] exactly the same categorical approach that this Court found problematic in” Sections 924(e)(2)(B)(ii) and 16(b). *Id.* at 2326-2327. Rejecting the government’s argument for a case-specific approach that “would look to the defendant’s actual conduct in the predicate offense,” the Court concluded that the statute’s text, context, and history, all supported use of the categorical approach in interpreting Section 924(c)(3)(B). *Id.* at 2327-2332 (citation and internal quotation marks omitted).

The rule that *Davis* announced—that Section 924(c)(3)(B) is unconstitutionally vague—applies retroactively to Ryle’s collateral challenge to his Section 924(c)(1)(A) sentence because it is a new substantive rule. See *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016). First, the rule is “new” because “the result was not *dictated* by precedent existing at the time the defendant’s conviction became final”—*i.e.*, the holding was not “apparent to all reasonable jurists.” *Chaidez v. United States*, 568 U.S. 342, 347 (2013) (citations omitted); see also *Welch*, 136 S. Ct. at 1264. Ryle’s conviction became final in 2009, well before the Supreme Court issued *Johnson* and *Dimaya*, which in any event did not dictate the

outcome in *Davis*, as the vigorous dissent of four Justices indicates. See *Davis*, 139 S. Ct. at 2336-2355 (Kavanaugh, J., dissenting). Second, the rule is “substantive” because it “alters the range of conduct or the class of persons that the law punishes.” *Welch*, 136 S. Ct. at 1264-1265 (citation omitted). By striking down Section 924(c)(3)(B) as void for vagueness, *Davis* changed Section 924(c)’s substantive reach by limiting its sentencing enhancements for crimes of violence to felony offenses that satisfy Section 924(c)(3)(A)’s more restrictive definition of the term.⁵ See *id.* at 1265 (concluding that *Johnson* is a substantive decision with retroactive effect in cases on collateral review).

Although *Davis*’s invalidation of Section 924(c)(3)(B) is a supervening change of law that retroactively applies to Ryle’s case on collateral review, this decision does not render his amended Section 2255 motion based on *Dimaya* timely. See 28 U.S.C. 2255(f)(3) (one-year limitations period for filing Section 2255 motion “shall *run from* * * * the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review”) (emphasis added). *Davis* does, however, nullify the basis of the district court’s order and judgment denying Ryle’s motion as untimely—that the Supreme

⁵ Section 924(c)(3)(A) defines “crime of violence” as 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).

Court had not yet held that the definition of crime of violence in Section 924(c)(3)(B) is unconstitutionally vague.

B. The District Court's Order And Judgment Should Be Vacated And The Case Remanded To That Court With Directions To Grant Ryle's Requested Relief In Accordance With Davis

Although Ryle's amended Section 2255 motion based on *Dimaya* was not timely under Section 2255(f)(3) when it was filed, Ryle ultimately would likely be entitled either to amend his motion in light of *Davis* upon a remand by this Court or to file a successive motion asserting his right to relief (upon certification by a panel of this Court). 28 U.S.C. 2255(f)(3) and (h)(2). The United States will not demand that Ryle take this additional step. “[A] limitations defense is not jurisdictional.” *United States v. Miller*, 868 F.3d 1182, 1185 (10th Cir. 2017), cert. denied, 138 S. Ct. 2622 (2018). The United States may waive this defense by intentionally declining to assert a timeliness challenge to a Section 2255 motion, see *Wood v. Milyard*, 566 U.S. 463, 474 (2012), and it chooses to do so here in the interest of justice.

In opposing Ryle's request for Section 2255 relief in the district court, the United States did not contend that his offense constituted a crime of violence under Section 924(c)(3)(A)—*i.e.*, that it was 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). Instead, the government maintained

that Ryle's unlawful arrest and kidnapping of the Wal-Mart truck driver in violation of 18 U.S.C. 242 was a crime of violence under Section 924(c)(3)(B). See Doc. 25, at 2 n.2. Because Section 924(c)(3)(B) is no longer valid after *Davis*, the United States respectfully requests this Court to vacate the district court order and judgment and remand the case to that court under Tenth Circuit Rule 27.3(A)(1)(b) and (c) with directions to grant Ryle's requested relief with respect to the sentence imposed under Section 924(c)(1)(A), in accordance with that decision.

CONCLUSION

The Court should grant the United States' motion, summarily vacate the district court's order and final judgment, and remand the case to that court with directions to grant Ryle's requested relief with respect to his sentence under Section 924(c)(1)(A), in accordance with *United States v. Davis*, 139 S. Ct. 2319 (2019).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached UNITED STATES' UNOPPOSED MOTION TO VACATE DISTRICT COURT ORDER AND JUDGMENT AND TO REMAND WITH DIRECTIONS TO GRANT APPELLANT'S REQUESTED RELIEF:

(1) complies with the type-volume limitation in Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 2,472 words; and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2016, in 14-point Times New Roman font.

s/ Christopher C. Wang
CHRISTOPHER C. WANG
Attorney

Date: July 19, 2019

CERTIFICATE OF DIGITAL SUBMISSION

I certify that with respect to the attached UNITED STATES' UNOPPOSED MOTION TO VACATE DISTRICT COURT ORDER AND JUDGMENT AND TO REMAND WITH DIRECTIONS TO GRANT APPELLANT'S REQUESTED RELIEF:

- (1) all required privacy redactions have been made per 10th Cir. R. 25.5;
- (2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents; and
- (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Symantec Endpoint Protection version 12.1.6, and according to the program are free of viruses.

s/ Christopher C. Wang
CHRISTOPHER C. WANG
Attorney

Date: July 19, 2019

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2019, I electronically filed the foregoing UNITED STATES' UNOPPOSED MOTION TO VACATE DISTRICT COURT ORDER AND JUDGMENT AND TO REMAND WITH DIRECTIONS TO GRANT APPELLANT'S REQUESTED RELIEF with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system.

I further certify that all parties are CM/ECF registered, and service will be accomplished by the appellate CM/ECF system.

s/ Christopher C. Wang
CHRISTOPHER C. WANG
Attorney