

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAR 17 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

RAFAEL MUNOZ GONZALEZ, AKA "C",
AKA Cisco, AKA Ralph Gonzalez-Munoz,
AKA Homeboy, AKA Big Homie,

No. 20-71710

Applicant,

MEMORANDUM*

v.

UNITED STATES OF AMERICA,

Respondent.

Application to File Second or Successive Petition
Under 28 U.S.C. § 2255

Argued and Submitted June 11, 2021
Pasadena, California

Before: CALLAHAN and FORREST, Circuit Judges, and SEEBORG,** District Judge.

Applicant Rafael Muñoz Gonzalez (Muñoz) seeks leave to file a second or successive motion for habeas relief under 28 U.S.C. § 2255. He argues that his conviction for possession of a firearm in furtherance of a crime of violence or drug

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Richard Seeborg, Chief United States District Judge for the Northern District of California, sitting by designation.

trafficking offense under 18 U.S.C. § 924(c) is invalid because his predicate crime—racketeering—is no longer a categorical “crime of violence” under a new rule of constitutional law announced in *United States v. Davis*, 139 S. Ct. 2319 (2019).¹ We have jurisdiction under 28 U.S.C. § 2255, and we grant Muñoz’s request for leave to file a second or successive § 2255 habeas motion.

In our concurrently filed opinion in *Cesar Muñoz Gonzalez v. United States*, __F.4th__ (9th Cir. 2022), we adopted a pragmatic approach for determining whether a new rule of constitutional law was “previously unavailable” within the meaning of § 2255(h)(2) that focuses on systemic barriers, including timing and accessible procedural means for presenting a claim. Applying this approach here, we conclude that an argument based on the new rule announced in *Davis* was not available to Muñoz while his first habeas motion was still pending. The district court rejected Muñoz’s initial habeas motion four and a half months after the Supreme Court issued *Davis*. Well over the majority of that time, Muñoz’s was held in the Special Housing Unit (SHU). While in the SHU, Muñoz’s access to the law library

¹The verdict form did not require the jury to specify which conviction—racketeering or Muñoz’s two drug offenses—served as the predicate offense for his § 924(c) conviction. The government concedes that, despite the uncertainty about which offense was the predicate for his § 924(c) conviction, Muñoz can establish that *Davis* at least advances his claim. *See Henry v. Spearman*, 899 F.3d 703, 706 (9th Cir. 2018) (petitioner need only show “possible merit to warrant a fuller exploration by the district court”) (citation omitted).

and legal documents was extremely limited; only one person is allowed in the SHU law library at a time and there are approximately 200 prisoners in the SHU. It takes up to three weeks for a prisoner to get access to the law library and visits are limited to two hours. And unlike in *Muñoz Gonzalez*, there is no indication that Muñoz knew about *Davis* during the short window of time before his initial habeas proceeding was denied. Given these restraints, the real-world circumstances that Muñoz faced rendered his *Davis* claim previously unavailable to him.

The request for leave to file a second or successive habeas motion is
GRANTED.