

NOT FOR PUBLICATION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

MICHAEL ANTHONY TORRES, AKA
Mikey,

No. 20-71724

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 Michael Anthony Torres 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 trafficking

* 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.

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 Torres’s request for leave to file a second or successive § 2255 habeas motion.

In our concurrently filed opinion, *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 Torres while his first habeas motion was still pending. The district court rejected Torres’s initial habeas motion less than two months after the Supreme Court issued *Davis*. Torres faced multiple institutional hurdles in accessing legal resources and preparing and filing legal documents and, unlike in *Muñoz Gonzalez*, there is no

¹The verdict form did not require the jury to specify which conviction—racketeering or Torres’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, Torres 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).

indication that Torres knew about *Davis* during the very short window of time before his initial habeas motion was denied. Given these restraints, we find that the real-world circumstances that Torres faced rendered his *Davis* claim previously unavailable to him.

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