

UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT  
GENERAL ORDER NO. 43

FILED  
U.S. COURT OF APPEALS  
ELEVENTH CIRCUIT

MAY 17 2018

David J. Smith  
Clerk

In the wake of the Supreme Court's decision in Sessions v. Dimaya, 584 U.S. \_\_\_, 138 S. Ct. 1204 (2018), a number of applications to file second or successive motions have been filed in this Court raising the issues of: (1) is the risk of force clause in 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague in light of Dimaya and, if so, (2) whether Dimaya is "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)(2).

On May 15, 2018, this Court granted en banc rehearing in Ovalles v. United States, 861 F.3d 1257 (11th Cir. 2017), to decide the first of those issues in a direct appeal case. Expedited briefing has been ordered, and oral argument is scheduled for July 9, 2018. Although Ovalles arises in the context of a first § 2255 motion, the en banc decision in that case will, in all likelihood, decide whether the risk of force clause in § 924(c)(3)(B) is unconstitutionally vague in light of Dimaya. If it does decide that issue, the Ovalles en banc decision will control the decision of the first issue presented in the related applications to file second or successive motions, and it could dictate the ruling on most, if not all, of those applications.

Considerations of efficiency, fairness, and uniformity of law and treatment dictate that we decide the issue of Dimaya's effect on § 924(c)(3)(B) the same way in the applications to file second or successive § 2255 motions that we decide it en banc in Ovalles. That requires us not to rule on those applications until after our Ovalles en banc decision is issued.

We recognize that 28 U.S.C. § 2244(b)(3)(D) provides that courts of appeal are to grant or deny applications to file second or successive motions or habeas

petitions not later than 30 days after the filing of the motion, and we have done that in virtually every one of the thousands of those applications (at least 99.9% of them) that have been filed since that requirement was enacted as part of the Anti-terrorism and Effective Death Penalty Act 21 years ago. As apparently every circuit to address the issue in a published opinion has held, however, the 30-day decisional deadline is hortatory or advisory and not jurisdictional; in some circumstances where it cannot be met if a court of appeals is to properly perform its function under § 2244(b)(3), the 30-day period may be exceeded. See Moore v. United States, 871 F.3d 72, 77 (1st Cir. 2017); Word v. Lord, 648 F.3d 129, 129 n.1 (2d Cir. 2011); In re Hoffner, 870 F.3d 301, 307 n.11 (3d Cir. 2017); In re Williams, 330 F.3d 277, 280–81 (4th Cir. 2003); In re Watkins, 810 F.3d 375, 379 n.5 (6th Cir. 2015); Gray–Bey v. United States, 201 F.3d 866, 867 (7th Cir. 2000); Ezell v. United States, 778 F.3d 762, 765 (9th Cir. 2015); Ochoa v. Sirmons, 485 F.3d 538, 539 n.1 (10th Cir. 2007). We have at least implicitly recognized as much. See In re Davis, 565 F.3d 810, 813 (11th Cir. 2009) (adjudicating an application to file a second or successive 28 U.S.C. § 2254 petition almost six months after it was filed).

In view of the circumstances, all applications to file second or successive § 2255 motions that involve, or that could be affected by, our en banc decision in the Ovalles case will be held in abeyance until after the Ovalles en banc decision is issued. Nothing in this order prevents the Court from granting en banc hearing in a case involving an application to file a second or successive motion that cleanly presents the issue of whether, if Dimaya means that the risk of force clause in § 924(c)(3)(B) is unconstitutionally vague, Dimaya is a new rule of constitutional law made retroactive by the Supreme Court, as required in 28 U.S.C. § 2255(h)(2).

FOR THE COURT:

A handwritten signature in cursive script that reads "Ed Carnes". The signature is written in black ink and is positioned above a horizontal line.

ED CARNES  
Chief Judge

May 17, 2018