

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

June 10, 2016

Elisabeth A. Shumaker
Clerk of Court

In re: KEVIN D. SMITH,

Movant.

No. 16-1166
(D.C. Nos. 16-CV-01031-CMA & 1:95-
CR-00271-CMA-1)
(D. Colo.)

ORDER

Before **BRISCOE, GORSUCH**, and **BACHARACH**, Circuit Judges.

Movant Kevin D. Smith, a federal prisoner proceeding pro se, seeks an order authorizing him to file a second or successive 28 U.S.C. § 2255 motion in the district court so he may assert a claim for relief based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). *See* 28 U.S.C. §§ 2255(h), 2244(b)(3). Because Movant has made a prima facie showing that he satisfies the relevant conditions for authorization under § 2255(h)(2), we grant authorization.

On May 5, 2016, Movant filed a motion to correct sentence under 28 U.S.C. § 2255 in the district court, challenging his sentence under *Johnson*. Recognizing that Movant's motion was second or successive and that he had not received prior circuit authorization to file it, *see* 28 U.S.C. § 2244(b)(2), (3), the district court transferred the matter to this court pursuant to 28 U.S.C. § 1631 to allow Movant to seek authorization, *see In re Cline*, 531 F.3d 1249, 1252 (10th Cir. 2008) (per curiam).

Movant received a sentence enhanced under the guideline for career offenders, which is triggered by the defendant having “two prior qualifying felony convictions of either a crime of violence or a controlled substance offense,” U.S.S.G. § 4B1.1(a). He alleges that at least one of his prior convictions qualified for this purpose by virtue of the residual clause in the guideline’s definition of a crime of violence, which encompasses crimes that “involve[] conduct that presents a serious potential risk of physical injury to another,” *id.* § 4B1.2(a)(2). An identical clause in the Armed Career Criminal Act was invalidated in *Johnson* on the ground that it was unconstitutionally vague.

To obtain authorization, Movant must make a prima facie showing that his claim meets the gatekeeping requirements of § 2255(h). 28 U.S.C. § 2244(b)(3)(C); *see also Case v. Hatch*, 731 F.3d 1015, 1028–29 (10th Cir. 2013). A claim may be authorized under § 2255(h)(2) if it relies on “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” *Johnson* announced a new rule of constitutional law that was made retroactive to cases on collateral review in *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016). We held in *In re Encinias*, No. 16–8038, 2016 WL 1719323, at *2 (10th Cir. Apr. 29, 2016) (per curiam), that second or successive § 2255 motions that rely on *Johnson* to challenge the career–offender guideline qualify for authorization under § 2255(h)(2).

Accordingly, we grant Kevin D. Smith authorization to file a second or successive § 2255 motion in district court to raise a claim based on *Johnson v. United States*. In the interest of justice, we direct the Clerk to transfer the now-authorized successive § 2255 motion back to the district court for the District of Colorado pursuant to 28 U.S.C.

§ 1631. The now-authorized § 2255 motion shall proceed in the district court as though filed on May 5, 2016, the date the § 2255 motion was initially filed in district court. *See* 28 U.S.C. § 1631; *Coleman v. United States*, 106 F.3d 339, 341 (10th Cir. 1997) (*per curiam*).

Entered for the Court

A handwritten signature in cursive script that reads "Elisabeth A. Shumaker". The signature is written in black ink and includes a long, sweeping horizontal flourish at the end.

ELISABETH A. SHUMAKER, Clerk