

FILED

United States Court of Appeals  
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

July 29, 2016

Elisabeth A. Shumaker  
Clerk of Court

In re: JOSE ERIC SILVA,

Movant.

No. 16-2142  
(D.C. Nos. 2:02-CR-01167-LH-1 & 1:04-  
CV-00998-LH-LFG)  
(D. N.M.)

ORDER

Before **KELLY, HARTZ**, and **MATHESON**, Circuit Judges.

Movant Jose Eric Silva, a federal prisoner proceeding through counsel, 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).<sup>1</sup> 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.

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,” United States Sentencing Guidelines Manual § 4B1.1(a) (U.S. Sentencing Comm’n). He alleges that at least one of his prior convictions qualified for this purpose by virtue of the residual clause in the

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<sup>1</sup> Pursuant to 18 U.S.C. § 3006A, Cori Ann Harbour-Valdez is appointed as counsel for Jose Eric Silva effective nunc pro tunc to the date the request for authorization to file a second or successive § 2255 motion was filed in this court.

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 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*, 821 F.3d 1224 (10th Cir. 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 Jose Eric Silva 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 to the district court for the District of New Mexico pursuant to 28 U.S.C. § 1631. The filing date of the authorized successive § 2255 motion is June 21, 2016, which is the

date the motion for authorization was filed in this court. *See* 28 U.S.C. § 1631.

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", with a long horizontal flourish extending to the right.

ELISABETH A. SHUMAKER, Clerk