

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

May 13, 2016

Elisabeth A. Shumaker
Clerk of Court

IN RE: MARCO A. HENDRICKSON,

Movant.

No. 16-5052
(D.C. Nos. 4:10-CV-00273-JHP-PJC &
4:08-CR-00197-JHP-2)
(N.D. Okla.)

ORDER

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

Movant Marco A. Hendrickson, 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.

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 Marco A. Hendrickson authorization to file a second or successive § 2255 motion in district court to raise a claim based on *Johnson v. United States*.

In addition, we note that Movant filed an unauthorized § 2255 motion in district court based on *Johnson* in case number 4:08-CR-00197-JHP on October 2, 2015. The government moved to dismiss the motion on the grounds that Movant did not obtain permission to file it from the Tenth Circuit. The district court has not yet issued a ruling. The unauthorized § 2255 motion presents the same issue as the motion for authorization that is now before us. Therefore, in the interest of efficiency, we advise the district court

that it has permission to consider the unauthorized § 2255 motion in light of the Supreme Court's recent rulings in *Johnson* and *Welch*.

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