

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

July 26, 2016

Elisabeth A. Shumaker  
Clerk of Court

In re: ANDRE LAMONT GREEN,  
  
Movant.

No. 16-5101  
(D.C. Nos. 4:98-CV-00739-TCK &  
4:95-CR-00077-TCK-1)  
(N.D. Okla.)

ORDER

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

Andre Lamont Green, a federal prisoner proceeding pro se, seeks authorization to file a second or successive 28 U.S.C. § 2255 motion. We ordered the government to respond to the motion. Upon consideration of Mr. Green's motion and the government's response, we grant authorization.

Mr. Green was convicted after a jury trial of a number of drug trafficking crimes. He was also convicted of two counts of possession of a firearm after a prior felony conviction in violation of 18 U.S.C. § 922(g)(1) and one count of possession of a firearm during a drug trafficking crime in violation of 18 U.S.C. § 924(c). He received an enhanced sentence of 360 months in prison under the career offender guideline, USSG § 4B1.1, because he had two prior convictions for crimes of violence as defined in USSG § 4B1.2. He also received an additional 60-month consecutive sentence for his § 924(c) conviction.

On direct appeal, we vacated Mr. Green’s § 924(c) conviction, remanded it for a new trial on that charge, and affirmed his remaining convictions. On remand, the government dismissed the § 924(c) charge, and the district court resentenced Mr. Green to 360 months in prison.

Mr. Green seeks authorization to challenge his sentence based on the decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). We may authorize the filing of a second or successive § 2255 motion if it is based on “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); *see also id.* § 2244(b)(3)(C).

*Johnson* voided in part the definition of a qualifying “violent felony” used for sentence enhancement under the Armed Career Criminal Act (ACCA). The problematic part of the definition is known as the “residual clause” and covers any crime that “involves conduct that presents a serious potential risk of physical injury to another,” 18 U.S.C. § 924(e)(2)(B)(ii). The Supreme Court held that “imposing an increased sentence under the residual clause of the [ACCA] violates the Constitution’s guarantee of due process.” *Johnson*, 135 S. Ct. at 2563. And in *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016), the Court held that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review.

For purposes of a motion for authorization, we have extended *Johnson*’s reach to the career offender guideline because the residual clause in the definition of “crime of violence” in § 4B1.2(a)(2) mirrors the language declared unconstitutional in *Johnson*.

*See In re Encinias*, 821 F.3d 1224, 1225-26 (10th Cir. 2016) (per curiam). Mr. Green asserts that the predicate convictions used to enhance his sentence—feloniously pointing a weapon and assault and battery with a dangerous weapon—do not qualify as crimes of violence. He contends that “[e]ven the use of impeccable factfinding procedures could not legitimate a sentence, based on the residual clause.” Mot. for Auth. at 8 (brackets omitted).

The government first argues that *Johnson* does not apply retroactively to the Sentencing Guidelines. But we have already explained in our decision in *Encinias* that a claim challenging a sentence enhanced under the residual clause in the career offender guideline is sufficiently based on *Johnson* to permit authorization. *See* 821 F.3d at 1226. And the *Johnson* decision has been made retroactively applicable to cases on collateral review by the Supreme Court in *Welch*. *See* 136 S. Ct. at 1268.

The government next argues that Mr. Green’s predicate convictions for feloniously pointing a weapon and assault and battery with a dangerous weapon could qualify under the “elements clause” in § 4B1.2(a)(1), which defines a “crime of violence” as an offense that “has as an element the use, attempted use, or threatened use of physical force against the person of another.” The government conducts its own elements analysis, comparing Mr. Green’s criminal information for feloniously pointing a weapon with that of another defendant in a different case to conclude that his offense would qualify under the elements clause. Likewise, the government argues that Mr. Green’s

offense of assault and battery with a dangerous weapon could qualify under the elements clause by looking at the criminal information and comparing it to case law in this circuit.

But the government does not demonstrate with citations to the record that the district court did rely on the elements clause in enhancing Mr. Green's sentence rather than the residual clause. The government is essentially making a harmless-error argument that should be addressed in the first instance by the district court.

Our role in evaluating a motion for authorization is to assess whether the movant has met the gatekeeping requirements of § 2255(h)—not to assess whether the movant ultimately will prevail on the merits. *See Case v. Hatch*, 731 F.3d 1015, 1028 (10th Cir. 2013) (explaining that a prima facie finding for purposes of second-or-successive authorization is “*not* a ‘preliminary merits assessment,’ but rather a determination focused ‘solely on the conditions specified in § 2244(b) that justify raising a new habeas claim . . . *not to any assessment regarding the strength of the petitioner’s case.*” (quoting *Ochoa v. Sirmons*, 485 F.3d 538, 541-42 (10th Cir. 2007)); *see also Ochoa*, 485 F.3d at 541 (“We find no basis in the plain language and functional structure of the statute to expand our gatekeeping role to include such a merits review.”). Despite a careful review of the record, we cannot verify that the district court designated Mr. Green as a career offender under the elements clause in § 4B1.2(a), not the residual clause.

Accordingly, we grant Mr. Green authorization to file a second or successive § 2255 motion in district court to raise a claim based on *Johnson*. We deny the government's request to abate this proceeding pending the Supreme Court's decision in

*Beckles v. United States*, No. 15-8544, 2016 WL 1029080 (U.S. June 27, 2016) (granting petition for writ of certiorari).

In the interest of justice, we direct the Clerk to transfer the now-authorized successive § 2255 motion to the district court for the Northern District of Oklahoma pursuant to 28 U.S.C. § 1631. The filing date of the authorized successive § 2255 motion is the earlier of 1) the date the motion for authorization was filed in this court, or 2) the date the motion for authorization was delivered to prison authorities for mailing, if the district court determines Mr. Green is entitled to the benefit of the prison mailbox rule, *see Price v. Philpot*, 420 F.3d 1158, 1165-66 (10th Cir. 2005); Fed. R. App. P. 25(a)(2)(C).<sup>1</sup>

Entered for the Court



ELISABETH A. SHUMAKER, Clerk

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<sup>1</sup> Our authorization to file the successive motion does not speak to the timeliness of the authorized § 2255 motion. Timeliness is a merits determination that is outside the scope of our gatekeeping inquiry under the relevant statutes. *See Ochoa v. Sirmons*, 485 F.3d 538, 541–42 (10th Cir. 2007) (per curiam) (appellate court’s gatekeeping role does not include even preliminary merits assessment); *In re Rains*, 659 F.3d 1274, 1275 (10th Cir. 2011) (per curiam) (timeliness of a habeas petition is a merits determination).