

FILED

United States Court of Appeals  
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

July 22, 2016

Elisabeth A. Shumaker  
Clerk of Court

---

In re: LARRY EUGENE STUTSON,

Movant.

No. 16-6170  
(D.C. Nos. 5:12-CV-00915-F &  
5:10-CR-00057-F-1)  
(W.D. Okla.)

---

**ORDER**

---

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

---

Larry Eugene Stutson, a federal prisoner proceeding pro se, seeks authorization 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). We ordered the government to respond to the motion. Upon consideration of Mr. Stutson's motion and the government's response, we grant authorization.

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). Mr. Stutson has made a prima facie showing that he satisfies the relevant conditions for authorization under § 2255(h)(2).

Mr. Stutson pled guilty to conspiracy to possess with intent to distribute, and conspiracy to distribute, cocaine powder in violation of 21 U.S.C. § 846. He received an enhanced sentence of twenty-six years in prison under the career-offender guideline,

which is triggered by the defendant having “two prior qualifying felony convictions of either a crime of violence or a controlled substance offense,” USSG § 4B1.1(a). The Presentence Investigation Report lists two predicate offenses: (1) a state conviction for a crime of violence, i.e., assault and battery with a dangerous weapon in violation of Okla. Stat. tit. 21, § 645 (2003); and (2) a federal conviction for controlled substance offenses. Our resolution of Mr. Stutson’s motion for authorization depends on whether the district court determined that his Oklahoma conviction was “a crime of violence” based on the elements clause of USSG § 4B1.2(a)(1) or the residual clause of § 4B1.2(a)(2). To explain the significance of that determination, we first summarize the holding in *Johnson* and then trace and apply its extension to the career-offender guideline.

*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 “involv[ing] 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 § 4B1.1—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) (“[G]iven the similarity of the clauses addressed in the two cases and the commonality of the constitutional concerns involved, we consider it appropriate to conclude, as a prima facie matter, that Encinias’ challenge to his career-offender sentence is sufficiently based on *Johnson* to permit authorization under § 2255(h)(2).”).

Citing *Encinias*, Mr. Stutson argues that his state conviction is no longer valid because the residual clause was invalidated in *Johnson*. The government responds that authorization is not warranted based on *Johnson* because a conviction for assault and battery with a dangerous weapon in violation of Oklahoma law is categorically a crime of violence under the elements clause in § 4B1.2(a)(1). The elements clause (sometimes referred to as the “force clause”) includes as a “crime of violence” any offense that “has as an element the use, attempted use, or threatened use of physical force against the person of another.” USSG § 4B1.2(a)(1). It remains valid post-*Johnson*. See 135 S. Ct. at 2563 (noting that the Court’s holding “does not call into question . . . the remainder of the Act’s definition of a violent felony”).

The government advances persuasive arguments as to why Mr. Stutson’s Oklahoma conviction is categorically a crime of violence. See Resp. to Mot. for Auth. at 8-9 (citing *United States v. Miller*, 539 F. App’x 874, 876 (10th Cir. 2013) (per curiam)); see also *United States v. Mitchell*, \_\_\_ F. App’x \_\_\_, 2016 WL 3569764, at \*6 (10th Cir. June 29, 2016) (holding that a conviction under certain portions of Okla. Stat. tit. 21,

§ 645 “categorically requires proof of the attempted use or threatened use of violent force” and thus satisfies the elements clause of § 4B1.2(a)(1)).

However, 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. Stutson as a career offender under the elements clause in § 4B1.2(a), not the residual clause. Accordingly, we grant him authorization to file a second or successive § 2255 motion in district court to raise a claim based on *Johnson*. In the interest of justice, we direct the Clerk to transfer the now-authorized successive § 2255 motion to the district court for the Western District of Oklahoma pursuant to 28 U.S.C. § 1631. The filing date of the authorized successive § 2255 motion is June 15, 2016,<sup>1</sup>

---

<sup>1</sup> The government mistakenly states that Mr. Stutson’s motion was filed in the district court on June 27, 2016 such that it was filed beyond the applicable one-year statute of limitations period. *See Resp. to Mot. to Auth.* at 7.

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 that reads "Elisabeth A. Shumaker". The signature is written in black ink and has a long, sweeping horizontal line extending to the right.

ELISABETH A. SHUMAKER, Clerk