

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

July 14, 2017

Elisabeth A. Shumaker
Clerk of Court

In re: CHRISTOPHER A. APALATEGUI,

Movant.

No. 17-2082
(D.C. No. 2:16-CV-00479-MV-SCY)
(D. N.M.)

ORDER

Before **PHILLIPS**, **McHUGH**, and **MORITZ**, Circuit Judges.

Christopher A. Apalategui, 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). In 2013, Mr. Apalategui was convicted of a firearms offense in violation of 18 U.S.C. § 922(g). His sentence for that offense was enhanced under the Armed Career Criminal Act (ACCA) based on his having three qualifying prior convictions for violent felonies. *See* 18 U.S.C. § 924(e)(1). He now seeks to file a § 2255 motion challenging his enhanced sentence based on the Supreme Court’s opinion in *Johnson*, which invalidated the residual clause in the ACCA’s definition of “violent felony” as unconstitutionally vague, *see* 135 S. Ct. at 2557, 2563.

To obtain authorization, Mr. Apalategui must make a prima facie showing that his claim meets the gatekeeping requirements of § 2255(h). *See* 28 U.S.C. § 2244(b)(3)(C). Relevant here is the requirement that the claim rely 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). *Johnson* announced a new rule of constitutional law, and the Supreme Court made *Johnson* retroactive to cases on collateral review in *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016).

Based on the information before us, we conclude that Mr. Apalategui has made the required showing. Accordingly, we grant Mr. Apalategui 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 New Mexico pursuant to 28 U.S.C. § 1631. The now-authorized § 2255 motion shall proceed in the district court as though filed on May 23, 2016, the date the 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



ELISABETH A. SHUMAKER, Clerk