

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: FRED D. SMITH,

Movant.

No. 16-6187
(D.C. Nos. 5:15-CV-00813-C &
5:09-CR-00368-C-1)
(W.D. Okla.)

ORDER

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

Movant Fred D. Smith, 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). In 2010, Movant was convicted of a firearms offense in violation of 18 U.S.C. § 922(g). He alleges that his sentence for that offense was enhanced under the Armed Career Criminal Act (ACCA) based on his having three qualifying prior convictions, see 18 U.S.C. § 924(e)(1), at least one of which was a violent felony. Movant 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.

To obtain authorization, Movant 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). Based on the information before us, we conclude that the Movant has made the required showing. *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).

The motion for authorization filed in this court on June 27, 2016, is granted. Pursuant to 28 U.S.C. §1631, we direct the Clerk to transfer the now-authorized successive § 2255 motion to the district court for the Western District of Oklahoma. The filing date for the authorized § 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 Movant 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).¹

Entered for the Court



ELISABETH A. SHUMAKER, Clerk

¹ 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); *cf. In re Jones*, 652 F.3d 603, 606 (10th Cir. 2010) (stating in dicta that timeliness of authorized successive claim is “question beyond the scope of our inquiry even when a claim is subject to § 2244(b)’s gatekeeping procedures”).