

UNITED STATES COURT OF APPEALS January 13, 2017
FOR THE TENTH CIRCUIT Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CHRISTOPHER LEE SWARTWOOD,

Defendant - Appellant.

No. 16-8092
(D. Ct. No. 1:16-CV-00128-SWS)
(D. Wyo.)

ORDER

Before **KELLY, HOLMES**, and **MORITZ**, Circuit Judges.

Christopher Swartwood petitioned the District of Wyoming under 28 U.S.C. § 2255 to vacate his sentence on the ground that *Johnson v. United States*, --- U.S. ----, 135 S. Ct. 2551 (2015), invalidates § 4B1.2(a) of the United States Sentencing Guidelines (“Guidelines”), on which his sentence was partly based. But the district stayed proceedings because the Supreme Court was to hear (and has now heard) oral argument in *Beckles v. United States*, No. 15-8544 (argued Nov. 28, 2016). *Beckles* presents questions that directly implicate Mr. Swartwood’s right to relief: (1) whether *Johnson* applies to the Guidelines, and (2) if so, whether that rule applies retroactively on collateral review.

Mr. Swartwood has attempted to appeal from the district court’s stay of his

proceedings. He argues that because he has already served beyond the top end of a sentencing range properly calculated under *Johnson*, any delay risks his being incarcerated under an unconstitutional sentence. Under his argument, time is of the essence.

A stay is rarely appealable. Mr. Swartwood presents us with two theories of jurisdiction so that we might hear his appeal. First, he argues that we have jurisdiction because the district court's issuance of a stay under these circumstances is tantamount to either a final order or the denial of injunctive relief. In the alternative, he asks that we consider his appeal as a petition for a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a).

Panels of this court have now answered these questions three times, each time reaching the same result in cases nearly indistinguishable from Mr. Swartwood's. In each case, the panel construed the appeal as a petition for mandamus; further, in each case, we granted the petition, ordering the district court to vacate the order to stay and to consider the merits of the habeas petition. *See United States v. Smith*, --- F. App'x ----, No. 16-8091, 2016 WL 6609499, at *1 (10th Cir. Nov. 9, 2016) (per curiam); *United States v. Carey*, --- F. App'x ----, No. 16-8093, 2016 WL 6543343, at *2–3 (10th Cir. Nov. 4, 2016); *United States v. Miller*, No. 16-8080, slip op. at 5–7 (10th Cir. Nov. 2, 2016). Although not binding precedent, we find these cases persuasive. *See* Fed. R. App. P. 32.1; 10th Cir. R. 32.1.

More specifically, we believe that Mr. Swartwood has made a sufficient showing

for issuance of a writ of mandamus. The mandamus standard is well settled:

In determining whether to issue a writ, we have identified five “nonconclusive guidelines” under which we ask whether (1) the petitioner has alternative means to secure relief; (2) the petitioner will be damaged in a way not correctable on appeal; (3) the district court’s order constitutes an abuse of discretion; (4) the district court’s order represents an oft-repeated error and manifest, persistent disregard of applicable law; and (5) the district court’s order raises new and important problems of law or issues of first impression.

Clyma v. Sunoco, Inc., 594 F.3d 777, 782 (10th Cir. 2010) (quoting *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1186–87 (10th Cir. 2009)). Mr. Swartwood has no other remedy, as the district court’s stay is not appealable; this is not the rare situation where the stay amounts to dismissal, foreclosing the possibility that his case will ever be considered on the merits. If Mr. Swartwood is correct, the court’s stay will harm him irreparably by illegal confinement. Such a stay is an abuse of discretion because judicial economy can rarely if ever outweigh a criminal defendant’s right to habeas review and, if meritorious, relief. *See Span-Eng Assocs. v. Weidner*, 771 F.2d 464, 469 (10th Cir. 1985); *CFTC v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1485 (10th Cir. 1983); *see also Johnson v. Rogers*, 917 F.2d 1283, 1284 (10th Cir. 1990) (“[W]rits of habeas corpus are intended to afford a ‘swift and imperative remedy in all cases of illegal restraint or confinement.’” (quoting *Fay v. Noia*, 372 U.S. 391, 400 (1963))). And the district court’s order raises a procedural issue of first impression, namely whether a § 2255 petition such as this one must be decided when the legal questions at issue are before the Supreme Court but are unlikely to be resolved soon enough to prevent illegal confinement. In sum,

based on consideration of these nonconclusive factors, and guided by persuasive authority from prior panels of our court, we conclude that Mr. Swartwood’s “right to issuance of the writ is clear and indisputable because, without it, he will effectively be denied his right to timely resolution of his § 2255 [petition].” *Miller*, slip op. at 7.

We construe Mr. Swartwood’s appeal as being a petition for a writ of mandamus. That petition is **GRANTED**. The district court is directed to vacate its order staying the proceedings and to consider the merits of Mr. Swartwood’s § 2255 petition.

Entered for the Court

JEROME A. HOLMES
Circuit Judge