FILED
United States Court of Appeals
Tenth Circuit

June 23, 2016

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: JAMES LYLE HERRON, Movant.	No. 16-1251 (D.C. Nos. 1:07-CV-00776-LTB & 1:03-CR-00161-LTB-1) (D. Colo.)

ORDER

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

James Lyle Herron seeks authorization to file a second or successive 28 U.S.C. § 2255 motion. For the following reasons, we deny 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. Herron asserts that he received an enhanced sentence under the residual clause of the Armed Career Criminal Act ("ACCA"). He argues he is entitled to bring a successive § 2255 claim based on the new rule of constitutional law announced in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

In *Johnson*, the Supreme Court held that "imposing an increased sentence under the residual clause of the [ACCA] violates the Constitution's guarantee of due process." 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.

A defendant becomes eligible for an enhanced sentence under the ACCA if he has three prior convictions for "a violent felony or a serious drug offense." 18 U.S.C. § 924(e)(1). A "violent felony" is defined as a crime "that . . . (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*." *Id.* § 924(e)(2)(B) (emphasis added). "The closing words of this definition, italicized above, have come to be known as the Act's residual clause." *Johnson*, 135 S. Ct. at 2556.

At sentencing, the district court concluded that Mr. Herron's three prior convictions for menacing met the definition for "violent felony" in § 924(e)(2)(B) under both the "elements" clause in subsection (i) and the residual clause in subsection (ii). *See* Mot. for Auth., Attach. 1, at 21 ("It is clear to me that the Colorado Menacing Statute has, as an element, both the attempted use and threatened use of physical force against the person of another. It also . . . is an offense that presents a serious potential risk of physical injury to another."); *id*. at 22 ("I concluded that each of these three menacing convictions constitute crimes of violence under 18 U.S.C., Section 924(e)[(2)](B), Subparagrah 1 and 2.").

On appeal, Mr. Herron challenged the district court's conclusion that his three prior menacing convictions could be used to support the ACCA enhancement under either § 924(e)(2)(B)(i) or (ii). *See United States v. Herron*, No. 04-1232, Aplt. Br. at 15-

17. In rejecting Mr. Herron's argument, we considered only the language in § 924(e)(2)(B)(i), explaining that the conduct described in the Colorado menacing statute for which he was convicted "easily satisfies the requirement of 'the threatened use of physical force against the person of another,' under the ACCA." *United States v. Herron*, 432 F.3d 1127, 1138 (10th Cir. 2005) (quoting 18 U.S.C. § 924(e)(2)(B)(i)).

The district court provided two alternate and distinct bases to enhance Mr. Herron's sentence under the ACCA—the elements clause in § 924(e)(2)(B)(i) and the residual clause in § 924(e)(2)(B)(ii). We then affirmed the district court's imposition of the ACCA enhancement, relying solely on the elements clause in § 924(e)(2)(B)(i). Because Mr. Herron's sentence was properly enhanced under the elements clause—which *Johnson* did not call into question—he has failed to demonstrate that his proposed successive § 2255 claim relies on the new rule of constitutional law announced in *Johnson*. Accordingly, we deny his motion. This denial of authorization "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court

ELISABETH A. SHUMAKER, Clerk