

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

July 6, 2016

Elisabeth A. Shumaker
Clerk of Court

In re: FRANK GUTIERREZ, JR.,

Movant.

No. 16-2148
(D.C. Nos. 1:95-CV-01071-JEC-RLP &
2:95-CR-00042-LH-1)
(D. N.M.)

ORDER

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

Frank Gutierrez, Jr. 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. Gutierrez asserts that he is entitled to bring a successive § 2255 claim to challenge his conviction under 21 U.S.C. § 846 based on the new rule of constitutional law announced in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

The *Johnson* decision 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). 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.

The career offender guideline contains an identical residual clause for its definition of “crime of violence,” U.S.S.G § 4B1.2(a)(2). We recently extended *Johnson*’s reach to defendants seeking authorization who received enhanced sentences as career offenders based on the residual clause in § 4B1.2(a)(2). *See In re Encinias*, ___ F.3d ___, 2016 WL 1719323, at *2 (10th Cir. Apr. 29, 2016) (per curiam) (concluding that challenge to career offender guideline was based on *Johnson* because of “the similarity of the clauses addressed . . . and the commonality of the constitutional concerns involved”).

Mr. Gutierrez, however, did not receive an increased sentence under the ACCA or the career-offender provision of the guidelines. Although he seeks authorization to challenge his conspiracy conviction under 21 U.S.C. § 846, he cannot demonstrate the requisite connection between his claim and the new rule of constitutional law established in *Johnson*. A claim challenging the constitutionality of the conspiracy statute is not based on the holding 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

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", with a long horizontal flourish extending to the right.

ELISABETH A. SHUMAKER, Clerk