

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

July 6, 2016

FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

In re: TRAVIS DENNY,

Movant.

No. 16-2162
(D.C. Nos. 1:04-CR-00666-JAP-1 &
1:09-CV-01049-JAP-KBM)
(D. N.M.)

ORDER

Before **KELLY, EBEL**, and **BRISCOE**, Circuit Judges.

Travis Denny seeks authorization to file a second or successive 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. 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. Denny asserts that he is entitled to challenge his enhanced sentence as a career offender 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”).

The career offender guideline, however, can be satisfied by “two prior felony convictions of either a crime of violence or a controlled substance offense.” U.S.S.G. § 4B1.1(a). While the definition of a crime of violence uses the invalidated residual clause, the definition of a controlled substance offense does not. *Compare id.* § 4B1.2(a)(2) *with id.* § 4B1.2(b).

The district court record shows Mr. Denny was designated a career offender based on his prior convictions for controlled substance offenses. *See United States v. Denny*, No. 04-CR-00666-JAP (D. N.M.), Doc. 129 (Sentencing Tr.) at 13 (explaining that Mr. Denny’s “serious offenses relate to drugs and drug trafficking”); *id.* (describing

convictions that would give Mr. Denny “a career offender bump” as selling one gram of heroin at the age of 20 and selling less than one gram of cocaine at the age of 22); *see also id.* Doc. 19 (Enhancement Information), at 1-2 (listing three prior convictions for controlled substance offenses). Under these circumstances, Mr. Denny cannot demonstrate the requisite connection between his claim and the new rule of constitutional law established in *Johnson*. A claim challenging a career offender enhancement predicated on controlled substance offenses is not based on the holding in *Johnson*.

Accordingly, we deny Mr. Denny’s motion for authorization. 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