

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

July 14, 2016

Elisabeth A. Shumaker
Clerk of Court

In re: FRANK L. GUTIERREZ,

Movant.

No. 16-2168
(D.C. Nos. 2:14-CV-00304-RB-SMV &
2:09-CR-00760-RB-1)
(D. N.M.)

ORDER

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

Frank L. Gutierrez 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.

This is the second motion for authorization Mr. Gutierrez has filed this year. In his first motion, Mr. Gutierrez sought authorization to challenge a 1993 conviction for conspiracy to possess marijuana 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 Armed Career Criminal Act [(ACCA)] violates the Constitution’s guarantee of due process.” *Id.* at 2563.

But Mr. Gutierrez did not receive an increased sentence under the ACCA or the career offender provision of the guidelines.¹ We therefore concluded that he could not “demonstrate the requisite connection between his claim and the new rule of constitutional law established in *Johnson*” because “[a] claim challenging the constitutionality of the conspiracy statute is not based on the holding in *Johnson*.” *In re Gutierrez*, No. 16-2148, Order at 2 (10th Cir. July 6, 2016). We denied authorization. *See id.*

In his current motion, Mr. Gutierrez again relies on the new rule of constitutional law announced in *Johnson*. He seeks authorization to challenge the constitutionality of 21 U.S.C. § 851 and the enhanced sentence he received for his 2011 conviction for possession with intent to distribute 50 grams of methamphetamine, in violation of 21 U.S.C. § 841(a)(1). Section 851 outlines the procedures for establishing prior convictions used to enhance a sentence under 21 U.S.C. § 841(b). Mr. Gutierrez’s sentence was increased from the mandatory minimum of 10 years to the mandatory minimum of 20 years because he was convicted of violating § 841(a) (for an offense that involved 50 grams of methamphetamine) “after a prior conviction for a felony drug offense.” *Id.* § 841(b)(1)(A)(viii).

Although Mr. Gutierrez did receive an enhanced sentence, his sentence was not enhanced under the ACCA or the career offender guideline based on a prior conviction

¹ The career offender guideline contains an identical residual clause in 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*, 821 F.3d 1224, 1225-26 (10th Cir. 2016) (per curiam).

that relied on the residual clause language found unconstitutional in *Johnson*. The *Johnson* decision does not affect the enhancement provisions in § 841 or § 851. A claim challenging an enhanced sentence under those statutes is therefore not based on the new rule of constitutional law established in *Johnson*.

Accordingly, we deny Mr. Gutierrez'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

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker".

ELISABETH A. SHUMAKER, Clerk