

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

July 1, 2016

Elisabeth A. Shumaker
Clerk of Court

In re: JOHNNY ADAM PEREZ,

Movant.

No. 16-3195
(D.C. No. 88-10094-01)
(D. Kan.)

ORDER

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

Johnny Perez, a federal prisoner proceeding pro se, 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. Perez asserts that he is entitled to bring a successive § 2255 claim to challenge his conviction under 18 U.S.C. § 924(c)(1) 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.

We recently extended *Johnson*’s reach to defendants seeking authorization who were designated as career offenders under the Sentencing Guidelines, U.S.S.G. § 4B1.1, based on predicate felony offenses that relied on the residual clause in that guideline’s definition of “crime of violence.” See *In re Encinias*, ___ F.3d ___, 2016 WL 1719323, at *1-*2 (10th Cir. Apr. 29, 2016) (per curiam). The residual-clause language in the career-offender guideline definition of “crime of violence” is identical to the residual-clause language that the Supreme Court found unconstitutionally vague in *Johnson*. *Id.* at *1. We therefore concluded that a challenge to a sentence that relied on the residual clause in the definition of “crime of violence” in the career-offender guideline was sufficiently based on *Johnson* to permit authorization because “of the similarity of the clauses addressed . . . and the commonality of the constitutional concerns involved.” *Id.* at *2.

Mr. Perez, however, did not receive an increased sentence under either the ACCA or the career-offender provision of the guidelines. Instead, his sentence was enhanced under the provision in § 924(c)(1) that provides for an increased sentence for possessing a firearm “during and in relation to any . . . drug trafficking crime” and possessing a firearm “in furtherance of any such crime,” 18 U.S.C. § 924(c)(1)(A). There is nothing in

the definition of a “drug trafficking crime” that contains similar language to the residual clause invalidated in *Johnson* or implicates the same types of constitutional concerns at issue in *Johnson*, and Mr. Perez does not explain how the new rule of law announced in *Johnson* otherwise supports his position. Mr. Perez has therefore failed to make a prima facie showing that he is entitled to authorization based on *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