

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

September 29, 2016

Elisabeth A. Shumaker
Clerk of Court

In re: EDUARDO
GUTIERREZ-AGUINIGA,

No. 16-3256
(D.C. No. 6:03-CR-10038-JTM-1)
(D. Kan.)

Movant.

ORDER

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

Eduardo Gutierrez-Aguiniga was found guilty after a jury trial of one count of conspiracy to possess with intent to distribute methamphetamine, in violation of 21 U.S.C. § 846, one count of possession with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1), and one count of possession of a firearm in furtherance of a drug trafficking offense, in violation of 18 U.S.C. § 924(c). He was sentenced to 292 months on the first two counts, to run concurrently, and 60 months on the § 924(c) count, to run consecutively. We affirmed his convictions and sentence on direct appeal.

Mr. Gutierrez-Aguiniga subsequently filed a 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. The district court dismissed his motion as untimely and he did not appeal. He now seeks authorization to file a second or successive § 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-Aguiniga asserts that he is entitled to bring a successive § 2255 claim to challenge his conviction and sentence under 18 U.S.C. § 924(c) 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 have also held that defendants are entitled to authorization if they were designated as career offenders under the Sentencing Guidelines based on prior felony convictions that qualified as predicate offenses under the residual clause in the definition of “crime of violence” in the career-offender guideline. *See In re Encinias*, 821 F.3d 1224, 1225-26 (10th Cir. 2016) (per curiam). The residual clause in the career-offender definition of “crime of violence” contains identical language to the residual clause in the ACCA’s definition of “violent felony.” *Compare* U.S. Sentencing Guidelines Manual § 4B1.2(a)(2) (U.S. Sentencing Comm’n 2003), *with* 18 U.S.C. § 924(e)(2)(B)(ii).

Mr. Gutierrez-Aguiniga did not receive an increased sentence under the ACCA or the career-offender guideline. He contends, however, that his § 924(c) conviction was based on the residual clause in that statute's definition of "crime of violence," *see* 18 U.S.C. § 924(c)(3)(B), which he argues is also unconstitutionally vague based on *Johnson*.

Section 924(c) provides for an enhanced sentence if a person is convicted of possessing a firearm "during and in relation to any crime of violence *or drug trafficking crime.*" *Id.* § 924(c)(1)(A) (emphasis added). Mr. Gutierrez-Aguiniga was convicted of possessing a firearm during and in relation to a drug trafficking crime; his conviction therefore did not involve the residual clause in § 924(c)'s definition of "crime of violence."

Given these circumstances, Mr. Gutierrez-Aguiniga cannot demonstrate the requisite connection between his claim and the new rule of constitutional law established in *Johnson*. A claim challenging a § 924(c) conviction for possessing a firearm during a drug trafficking crime 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



ELISABETH A. SHUMAKER, Clerk