

United States Court of Appeals  
Tenth Circuit

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

July 25, 2016

Elisabeth A. Shumaker  
Clerk of Court

In re: DEAN RAMIREZ,  
  
Movant.

No. 16-4125  
(D.C. Nos. 1:08-CV-00157-TC,  
1:03-CR-00062-TC-BCW-1 &  
1:03-CR-00069-TC-6)  
(D. Utah)

**ORDER**

Before **PHILLIPS, O'BRIEN**, and **McHUGH**, Circuit Judges.

Dean Ramirez, 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. Ramirez seeks authorization to file a second or successive § 2255 motion based on the new rule of constitutional law announced in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

The *Johnson* decision involved a defendant who received an enhanced sentence under the Armed Career Criminal Act (“ACCA”). A defendant becomes eligible for an enhanced sentence under the ACCA if he is convicted of violating 18 U.S.C. § 922(g)

and has three prior convictions for “a violent felony or a serious drug offense.” 18 U.S.C. § 924(e)(1). A “violent felony” is defined as a crime “that . . . (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another.*” *Id.* § 924(e)(2)(B) (emphasis added). “The closing words of this definition, italicized above, have come to be known as the Act’s residual clause.” *Johnson*, 135 S. Ct. at 2556.

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 received enhanced sentences under the career offender provision of the Sentencing Guidelines because the residual clause in that provision mirrors the one declared unconstitutional in *Johnson*. See *In re Encinias*, 821 F.3d 1224, 1225-26 (10th Cir. 2016) (per curiam).

Mr. Ramirez was charged in two criminal cases in the District of Utah (1:03-CR-00062-TC and 1:03-CR-00069-TC). He was convicted after a jury trial of one count of conspiracy to distribute controlled substances in violation of 21 U.S.C. § 846 and one count of possession of a firearm by a restricted person in violation of § 922(g)(1) in case 1:03-CR-00062-TC. He was also convicted of one count of possession of a firearm by a restricted person in violation of § 922(g)(1) and one count of use of a

communication facility in a drug trafficking crime in violation of 21 U.S.C. § 843(b) in case 1:03-CR-00069-TC. He was sentenced to thirty years in prison in both cases with the sentences to run concurrently.

In his motion for authorization, he contends that his sentence was unconstitutionally enhanced under the ACCA and the career offender provision of the Sentencing Guidelines. He also asserts that his conviction for violating 18 U.S.C. § 924(c) is unconstitutional after *Johnson*.

We see no evidence in the district court record, however, that Mr. Ramirez's sentence was enhanced under the ACCA or the career offender provision of the guidelines. In addition, the judgment does not show that he was convicted of violating § 924(c). Mr. Ramirez appears to have used a standard form for his motion for authorization that does not reflect his individual circumstances.

At the end of the form motion for authorization, Mr. Ramirez did attach a separate one-page document in which he asserts that he should receive authorization to challenge his § 922(g) conviction. Although Mr. Ramirez was convicted of two separate counts of possessing a firearm by a restricted person in violation of § 922(g), the *Johnson* decision did not impact the constitutionality of convictions under that statute. Rather, *Johnson* affected only those defendants who were convicted of violating § 922(g), and whose sentences were enhanced based on prior convictions for violent felonies that relied on the residual clause in § 924(e)(2)(B). Mr. Ramirez has not demonstrated that he received such an enhancement.

Under these circumstances, Mr. Ramirez has not made a prima facie showing that he is entitled to authorization to file a second or successive § 2255 based on the new rule of constitutional law announced 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