

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

October 3, 2016

Elisabeth A. Shumaker
Clerk of Court

In re: MOISES GAETA,

Movant.

No. 16-5140
(D.C. Nos. 4:16-CV-00396-CVE-FHM &
4:08-CR-00051-CVE-13)
(N.D. Okla.)

ORDER

Before **KELLY, BACHARACH**, and **PHILLIPS**, Circuit Judges.

Moises Gaeta 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. Gaeta asserts that he is entitled to bring a successive § 2255 claim to challenge his sentence based on the Supreme Court’s decisions in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016).

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

that “involves 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*, the Court held that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. 136 S. Ct. at 1268.

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 2008) with 18 U.S.C. § 924(e)(2)(B)(ii).

Mr. Gaeta pleaded guilty to one count of conspiracy to possess with the intent to distribute controlled substances in violation of 21 U.S.C. §§ 841(a) and 846 and one count of conspiracy to commit an offense against the United States—gun smuggling—in violation of 18 U.S.C. § 371. He was sentenced to 324 months’ imprisonment.¹

¹ In May 2015, his sentence was reduced on the court’s motion under 18 U.S.C. § 3582 to 136 months’ imprisonment.

In calculating his sentence, Mr. Gaeta received enhancements to his base offense level under §§ 2D1.1(b)(1), 3B1.4, and 3C1.1 of the Guidelines. He argues that his sentence enhancements are now illegal after the Supreme Court's decisions in *Johnson* and *Welch*. But he did not receive an increased sentence under the ACCA. Likewise, he did not receive an enhanced sentence under the career-offender provision of the Guidelines or an enhanced sentence under any other Guidelines provision that requires consideration of whether he committed a "crime of violence" as defined in USSG § 4B1.2(a)(2). See USSG §§ 2D1.1(b)(1), 3B1.4, 3C1.1.

Under these circumstances, Mr. Gaeta has failed to make a prima facie showing that he is entitled to authorization 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



ELISABETH A. SHUMAKER, Clerk