

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

July 8, 2016

Elisabeth A. Shumaker
Clerk of Court

In re: MELESIO U. ROJAS,

Movant.

No. 16-8067
(D.C. Nos. 2:14-CV-00125-ABJ &
2:06-CR-00131-ABJ-3)
(D. Wyo.)

ORDER

Before **TYMKOVICH**, Chief Judge, **LUCERO** and **PHILLIPS**, Circuit Judges.

Melesio U. Rojas, 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. Rojas asserts that he is entitled to bring a successive § 2255 claim to challenge his conviction 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 recently extended *Johnson*’s reach to defendants seeking authorization who were designated as career offenders under U.S.S.G. § 4B1.1, based on predicate felony offenses that relied on the residual clause in the definition of “crime of violence” in U.S.S.G. § 4B1.2(a)(2). See *In re Encinias*, 821 F.3d 1224, 1225-26 (10th Cir. 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 1225. 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 1226.

Mr. Rojas, however, did not receive an increased sentence under either the ACCA or the career offender provision of the guidelines. He pleaded guilty to use of a firearm during and in relation to a drug trafficking offense and aiding and abetting, in violation of 18 U.S.C. §§ 2 and 924(c)(1)(A)(i); and interstate transportation of stolen property, in violation of 18 U.S.C. § 2314. He was sentenced to 152 months in prison.

Mr. Rojas 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." 18 U.S.C. § 924(c)(1)(A). But the record reflects that Mr. Rojas was convicted of violating § 924(c) for using a firearm during and in relation to a drug trafficking crime, *see United States v. Rojas*, 2:06-cr-00131-ABJ-3 (D. Wyo.), Doc. 110 (Judgment) at 1; his conviction did not involve the use of the residual clause in § 924(c)'s definition of "crime of violence."

Given these circumstances, Mr. Rojas 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 using 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