

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

September 2, 2016

Elisabeth A. Shumaker
Clerk of Court

In re: OMAR HUERTA-ROSAS,

Movant.

No. 16-8090
(D.C. Nos. 1:16-CV-00203-ABJ &
2:09-CR-00136-ABJ-2)
(D. Wyo.)

ORDER

Before **HARTZ, GORSUCH**, and **MATHESON**, Circuit Judges.

Omar Huerta-Rosas seeks authorization to file a second or successive 28 U.S.C. § 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. Huerta-Rosas asserts that he is entitled to bring a successive § 2255 claim to challenge his sentence based on the new rule of constitutional law announced in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

In *Johnson*, the Supreme Court held that “imposing an increased sentence under the residual clause of the Armed Career Criminal Act [(ACCA)] violates the Constitution’s guarantee of due process.” *Id.* 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 based on predicate felony offenses that relied on the residual clause in the definition of "crime of violence" in the Sentencing Guidelines. *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," U.S. Sentencing Guidelines Manual § 4B1.2 (U.S. Sentencing Comm'n), is identical to the residual clause language that the Supreme Court found unconstitutionally vague in *Johnson*. *See Encinias*, 821 F.3d at 1225.

Mr. Huerta-Rosas entered a guilty plea to the following charges: conspiracy to traffic in methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846; possession of a firearm in furtherance of a drug trafficking offense, in violation of 18 U.S.C. § 924(c)(1), and encouraging an illegal alien to unlawfully enter the United States, in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(I). The Presentence Report (PSR) recommended a three-level enhancement under USSG § 3B1.1(b) for defendant's role as a manager or supervisor of the criminal activity. The PSR also recommended a two-level enhancement under USSG § 3B1.4 because Mr. Huerta-Rosas used a minor to assist in committing the offense.

The PSR calculated an advisory guideline range of 292-365 months, to be followed by a consecutive 60-month sentence for the § 924(c) charge. But the parties had entered into a Fed. R. Crim. P. 11(c)(1)(C) binding plea agreement with a stipulated sentence of 168 months, to be followed by a consecutive 60-month sentence. The district

court approved the plea agreement and sentenced Mr. Huerta-Rosas to the agreed-upon sentence, which was 124 months below the low-end of the guideline range.

Although Mr. Huerta-Rosas asserts that his sentence was enhanced in reliance on the residual clause in the definition of “crime of violence” in USSG § 4B1.2, there is no evidence in the record that reflects such an enhancement. Accordingly, Mr. Huerta-Rosas 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*. 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 that reads "Elisabeth A. Shumaker". The signature is written in black ink and includes a long, sweeping horizontal stroke at the end.

ELISABETH A. SHUMAKER, Clerk