

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

August 22, 2016

Elisabeth A. Shumaker
Clerk of Court

In re: FIDENCIO VERDIN-GARCIA,

Movant.

No. 16-3236
(D.C. Nos. 2:05-CR-20117-JWL-1 &
2:09-CV-02492-JWL)
(D. Kan.)

ORDER

Before **MATHESON, EBEL** and **O'BRIEN**, Circuit Judges.

Fidencio Verdin-Garcia was convicted by a jury in 2006 of multiple drug crimes in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(viii); 843(b); and 846. He was sentenced to concurrent terms of life and four years' imprisonment. He moved unsuccessfully in 2009 to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Verdin-Garcia now seeks authorization to file a second or successive § 2255 motion challenging his sentence. We deny the motion.

Verdin-Garcia contends that his proposed § 2255 motion relies 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). He must make a prima facie showing that he can satisfy this gate-keeping requirement. *See In re Shines*, 696 F.3d 1330, 1332 (10th Cir. 2012) (per curiam); *see also* 28 U.S.C. § 2244(b)(3)(C). He points to the Supreme Court's holding in *Johnson v. United States*, __ U.S. __, 135 S. Ct. 2551

(2015). But the requirements of § 2255(h)(2) are not satisfied by the mere citation of a new rule of constitutional law in the abstract. The rule of law must actually be the basis of the claim for which authorization is sought. *In re Encinias*, 821 F.3d 1224, 1225 n.2 (10th Cir. 2016) (per curiam).

Johnson voided, in part, the definition of a qualifying “violent felony” used for sentence enhancement under the Armed Career Criminal Act (ACCA). *Johnson* held that a “residual clause” in the definition—covering 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)—violated the constitutional prohibition against vague criminal laws. *Johnson*, 135 S. Ct. at 2563. The Supreme Court made *Johnson*’s holding retroactive to cases on collateral review in *Welch v. United States*, __ U.S. __, 136 S. Ct. 1257, 1265 (2016). We have extended *Johnson*’s holding to identical residual-clause language used in the definition of a “crime of violence” in the career-offender guideline, U.S.

Sentencing Guidelines Manual § 4B1.2(a)(2). *See United States v. Madrid*, 805 F.3d 1204, 1210-11 (10th Cir. 2015). And we have authorized a second or successive § 2255 motion challenging a sentence enhanced under that guideline as “sufficiently based on *Johnson* to permit authorization under § 2255(h)(2).” *In re Encinias*, 821 F.3d at 1226.

Here we conclude that Verdin-Garcia has not demonstrated the requisite connection between his proposed claims and the new rule established in *Johnson*. He first challenges a sentence enhancement under USSG § 2D1.1(b)(1), which increased his base offense level “[i]f a dangerous weapon (including a firearm) was possessed.” He

argues that this “firearm enhancement” is void under the holding in *Johnson* because it “involves parallel vague language . . . repudiated by the Supreme Court in *Johnson* as unconstitutionally vague.” Mot. at 5-6; *see also id.* at 9 (claiming this guideline and the ACCA residual clause are “identically worded”). But Verdin-Garcia fails to show that § 2D1.1(b)(1), or the applicable commentary to that provision, contain the language at issue in *Johnson*. His claim is therefore not *based on* the holding in *Johnson* that invalidated the residual clause of the definition of “violent felony” in the ACCA.

Verdin-Garcia also appears to argue that *Johnson* invalidated a portion of the definition of “crime of violence” in 18 U.S.C. §§ 924(c)(3) and 16(b). But he does not show that this definition had any relevance to or effect on his conviction or his sentence. Therefore, he presents no *prima facie* basis to challenge the application of these statutes under the rule announced in *Johnson*.

Finally, we note that Verdin-Garcia originally—and mistakenly—filed his motion for authorization in the district court. After holding it lacked jurisdiction to consider the motion, the court assessed whether to transfer it to this court under 28 U.S.C. § 1631. In doing so, it reviewed Verdin-Garcia’s presentence investigation report and concluded that he had not been deemed an armed career criminal, nor was any guideline used in calculating his sentence implicated by the Supreme Court’s decision in *Johnson*. After concluding that the *Johnson* decision did not apply to Verdin-Garcia’s sentence in any respect, the district court declined to transfer his motion for authorization to this court in the interests of justice.

Thus, based on the contentions in his motion for authorization and the district court's statements in its order denying a transfer under § 1631, it does not appear reasonably likely that Verdin-Garcia has satisfied the stringent requirement in § 2255(h)(2) for filing a second or successive motion. *See Case v. Hatch*, 731 F.3d 1015, 1028 (10th Cir. 2013).

Verdin-Garcia's motion for authorization is denied. 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", followed by a long horizontal flourish.

ELISABETH A. SHUMAKER, Clerk