

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

June 30, 2016

Elisabeth A. Shumaker
Clerk of Court

In re: JAMES PAT HUNT,

Movant.

No. 16-6171
(D.C. No. 5:97-CR-00127-M-1)
(W.D. Okla.)

ORDER

Before **BRISCOE**, **McHUGH**, and **MORITZ**, Circuit Judges.

James Pat Hunt 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. Hunt asserts that he is entitled to bring a successive § 2255 motion to challenge his designation as a career offender 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.

The career-offender guideline contains an identical residual clause for its definition of “crime of violence,” U.S.S.G § 4B1.2(a)(2). We recently extended *Johnson*’s reach to defendants seeking authorization who received enhanced sentences as career offenders based on the residual clause in § 4B1.2(a)(2). *See In re Encinias*, ___ F.3d ___, 2016 WL 1719323, at *2 (10th Cir. Apr. 29, 2016) (per curiam) (concluding that challenge to career-offender guideline was based on *Johnson* because of “the similarity of the clauses addressed . . . and the commonality of the constitutional concerns involved”).

The career-offender guideline, however, can be satisfied by “two prior felony convictions of either a crime of violence or a controlled substance offense.” U.S.S.G. § 4B1.1(a). While the definition of a crime of violence uses the invalidated residual clause, the definition of a controlled substance offense does not. *Compare id.* § 4B1.2(a)(2) *with id.* § 4B1.2(b).

Mr. Hunt alleges that the sentencing court improperly relied on a prior conviction for witness intimidation as a qualifying crime of violence under the residual clause of the guideline to designate him a career offender. But the district court record shows that the court relied on Mr. Hunt’s two prior convictions for controlled substance offenses to designate him a career offender. *See United States v. Hunt*, No. 97-cr-00127,

(W.D. Okla. May 15, 1998) at Doc. 91 (resentencing courtroom minutes stating that the court “used the two previous controlled substance offenses in determining [defendant] to be a career offender”).

Under these circumstances, Mr. Hunt cannot demonstrate the requisite connection between his claim and the new rule of constitutional law established in *Johnson*. A claim challenging a career offender enhancement predicated on controlled substance offenses is simply not based on the holding in *Johnson*, as required for authorization under § 2255(h)(2). See *Encinias*, 2016 WL 1719323, at *1 n.2 (explaining that to obtain authorization under § 2255(h)(2), the proposed “claim must be based upon or rely on the new rule cited by the movant” (internal quotation marks and brackets omitted)).

Accordingly, we deny Mr. Hunt’s motion for authorization. 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 horizontal flourish line.

ELISABETH A. SHUMAKER, Clerk