

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

August 11, 2016

Elisabeth A. Shumaker
Clerk of Court

In re: TUESDAY SHALON JOHNSON,

Movant.

No. 16-6184
(D.C. Nos. 5:10-CV-01060-M &
5:09-CR-00021-M-3)
(W.D. Okla.)

ORDER

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

Movant Tuesday Shalon Johnson pleaded guilty in 2009 to one count of distribution of a quantity of crack cocaine in violation of 21 U.S.C. § 841(a)(1). She seeks authorization to file a second or successive 28 U.S.C. § 2255 motion challenging her 240-month sentence for that conviction as contrary to *Johnson v. United States*, 135 S. Ct. 2551 (2015). Because Ms. Johnson has failed to make a prima facie showing that she satisfies the relevant conditions for authorization under § 2255(h)(2), we deny her motion.

To obtain authorization, Ms. Johnson must make a prima facie showing that her 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); *see also id.* § 2244(b)(3)(C). *Johnson* voided, in part, the definition of qualifying “violent felonies” used for sentence enhancement under the ACCA. Specifically, *Johnson* held that the definition’s residual clause—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)—violates due process. *See Johnson*, 135 S. Ct. at 2557. The Supreme Court made *Johnson*’s holding retroactive to cases on collateral review in *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016). And this court has held that *Johnson*’s reach extends to defendants seeking authorization who were designated as career offenders under U.S. Sentencing Guidelines Manual § 4B1.1 (U.S. Sentencing Comm’n 2008), based on predicate felony offenses that relied on the residual clause in the definition of “crime of violence” in USSG § 4B1.2(a). *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.

Ms. Johnson does not specify under what provision her sentence was allegedly enhanced, only that the “residual clause that [she] has been sentenced under is now void due to vagueness,” *see* Mot. for Auth. at 8. It is apparent from her Presentence Investigation Report (“PSR”), however, that she was designated a career offender under USSG § 4B1.1. The career offender designation may be applied if a defendant “has at least two prior felony convictions of either a crime of violence or a controlled substance offense.” USSG § 4B1.1(a). The PSR also makes it clear that two prior felony convictions involving the distribution of drugs were the basis for her career offender designation. The *Johnson* decision affects sentence enhancements under § 4B1.1 only if the qualifying predicate offenses are *crimes of violence* and has no impact on the use of prior controlled substance offenses as the basis for enhancement. Because Ms. Johnson’s

qualifying predicate offenses are both controlled substance offenses, rather than crimes of violence, the claim she seeks authorization to bring is not based on the new rule of constitutional law announced in *Johnson*.

Accordingly, we deny Ms. Johnson'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 long horizontal flourish.

ELISABETH A. SHUMAKER, Clerk