

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

June 29, 2016

Elisabeth A. Shumaker
Clerk of Court

In re: BRENDA TONIECE VANN,

Movant.

No. 16-7049
(D.C. Nos. 6:14-CV-00300-JHP &
6:13-CR-00027-JHP-1)
(E.D. Okla.)

ORDER

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

Brenda Toniece Vann 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). Ms. Vann asserts that she is entitled to bring a successive § 2255 claim based on the new rule of constitutional law announced in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

The *Johnson* decision involved a defendant who received an enhanced sentence under the Armed Career Criminal Act (“ACCA”). A defendant becomes eligible for an enhanced sentence under the ACCA if he has three prior convictions for “a violent felony or a serious drug offense.” 18 U.S.C. § 924(e)(1). A “violent felony” is defined as a crime “that . . . (i) has as an element the use, attempted use, or threatened use of physical

force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another.*” *Id.* § 924(e)(2)(B) (emphasis added). “The closing words of this definition, italicized above, have come to be known as the Act’s residual clause.” *Johnson*, 135 S. Ct. at 2556.

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 received enhanced sentences under the career-offender provision of the Sentencing Guidelines because the residual clause in that provision mirrors the one declared unconstitutional in *Johnson*. See *In re Encinias*, ___ F.3d ___, 2016 WL 1719323, at *2 (10th Cir. Apr. 29, 2016) (per curiam).

Ms. Vann, however, did not receive an increased sentence under the ACCA or an enhanced sentence under the career-offender provision of the guidelines. She was sentenced to 235 months’ imprisonment after pleading guilty to conspiracy to manufacture methamphetamine in violation of 21 U.S.C. § 846, manufacturing methamphetamine in violation of 21 U.S.C. § 841, and manufacturing methamphetamine on premises where children are present or reside in violation of 21 U.S.C. §§ 860a and 841.

Ms. Vann did receive a sentence enhancement under U.S.S.G § 2D1.1(b)(13)(D). That guidelines provision provides for a six-level increase “[i]f the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a *substantial risk of harm* to the life of a minor or an incompetent” *Id.* (emphasis added). Ms. Vann seeks authorization to challenge the imposition of this enhancement based on the Supreme Court’s *Johnson* decision.

In her proposed § 2255 motion, Ms. Vann argues that the “risk of harm” language in § 2D1.1(b)(13)(D) is just as vague as the “serious potential risk” language in the residual clause at issue in *Johnson*. The government did raise concerns in *Johnson* that the decision could cast doubt on the constitutionality of a number of federal laws that rely on terms like “substantial risk.” 135 S. Ct. at 2561. But the Supreme Court disagreed, noting that “almost all of the [laws the government cites] require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*.” *Id.* As the Supreme Court explained, “[a]s a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as ‘substantial risk’ to real-world conduct.” 135 S. Ct. at 2561. In contrast, “[t]he residual clause . . . requires application of the ‘serious potential risk’ standard to an idealized ordinary case of the crime.” *Id.* “Because the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect, this abstract inquiry offers significantly less predictability than one that deals with the actual, not with an imaginary condition other than the facts.” *Id.* (internal quotation marks omitted).

The record below reflects that Ms. Vann’s granddaughter suffered chemical burns from Ms. Vann’s methamphetamine production while the granddaughter was in Ms. Vann’s care. The district court considered this “real-world conduct” when deciding that it was appropriate to impose the § 2D1.1 enhancement. As the Supreme Court explained in *Johnson*, its holding did not cast doubt on the constitutionality of statutes that call for applying a qualitative standard to actual conduct. And courts considering the § 2D1.1 enhancement do not engage in the type of abstract inquiry that the Supreme Court found problematic in *Johnson*.

We therefore conclude that Ms. Vann’s proposed challenge to § 2D1.1 is not based on *Johnson* for the purposes of obtaining authorization because it does not implicate the type of constitutional concerns that led the Supreme Court to invalidate the residual clause. *Cf. Encinias*, 2016 WL 1719323, at * 2 (concluding that challenge to career-offender guidelines was based on *Johnson* because of “the similiarity of the clauses addressed . . . and the commonality of the constitutional concerns involved”). Accordingly, Ms. Vann has failed to make a prima facie showing that she 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



ELISABETH A. SHUMAKER, Clerk