

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

May 4, 2016

Elisabeth A. Shumaker
Clerk of Court

In re: HERIBERTO GARCIA-
RODRIGUEZ,

Movant.

No. 16-8042
(D.C. Nos. 1:14-CV-00183-NDF &
2:03-CR-00061-WFD-1)
(D. Wyo.)

ORDER

Before **BACHARACH**, **EBEL**, and **McHUGH**, Circuit Judges.

Heriberto Garcia-Rodriguez was convicted of possession with intent to distribute methamphetamine and received a life sentence under 21 U.S.C. § 841(b)(1)(A)(viii). *See United States v. Garcia-Rodriguez*, 127 F. App'x 440 (10th Cir. 2005) (affirming conviction and sentence). He now seeks authorization to file his third motion for relief under 28 U.S.C. § 2255, challenging his life sentence under *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551 (2015), which voided in part the definition of qualifying “violent felonies” used for sentence enhancement under the Armed Career Criminal Act. Specifically, *Johnson* held 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)—was unconstitutionally vague. Because *Johnson*’s holding is irrelevant to Mr. Garcia-Rodriguez’s sentence, we deny his request for authorization.

Mr. Garcia-Rodriguez relies on § 2255(h)(2), which permits authorization of second or successive motions that “contain . . . a new rule of constitutional law, made

retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” Our precedent reads the reference to motions that “contain” new rules of constitutional law as requiring that the claims actually be “based upon” or “rel[y] on” the new rule invoked by the movant. *See, e.g., United States v. Wetzel-Sanders*, 805 F.3d 1266, 1268 (10th Cir. 2015), *cert. denied*, 2016 WL 1259185 (May 2, 2016); *In re Shines*, 696 F.3d 1330, 1332 (10th Cir. 2012). That is not the case here. The predicate offenses underlying the mandatory life sentence imposed on Mr. Garcia-Rodriguez were “two or more prior convictions for a felony drug offense.” 21 U.S.C. § 841(b)(1)(A); *see Garcia-Rodriguez*, 127 F. App’x at 448 n.4 (citing the two prior state drug convictions relied on for imposing sentence under § 841(b)(1)(A)). The holding in *Johnson* bears no material relation to this sentence.

We therefore deny 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