

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

June 15, 2016

Elisabeth A. Shumaker
Clerk of Court

In re: JARED LINCOLN FITZGERALD,

Movant.

No. 16-8054
(D.C. Nos. 2:16-CV-00092-NDF &
2:06-CR-00227-CAB-1)
(D. Wyo.)

ORDER

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

Jared Lincoln Fitzgerald seeks authorization to file a second or successive 28 U.S.C. § 2255 motion. 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. Fitzgerald asserts that he was sentenced as a career offender under U.S.S.G. § 4B1.1 and seeks to challenge his sentence based on the new rule of constitutional law announced in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

In *Johnson*, the Supreme Court held that “imposing an increased sentence under the residual clause of the Armed Career Criminal Act 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 § 4B1.1 for purposes of a motion for authorization because the residual clause in § 4B1.1 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).

Upon consideration of his motion, we conclude that Mr. Fitzgerald has failed to make a prima facie showing that the successive claims he seeks to bring are based on the new rule of constitutional law announced in *Johnson*. Under current law, the *Johnson* decision would not change his sentence and his proposed claim under the Fair Sentencing Act (which perhaps could change his sentence) is premature. Because he has not made the prima facie showing required for authorization under § 2255(h)(2), we deny the motion. 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