

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

March 6, 2017

Elisabeth A. Shumaker
Clerk of Court

In re: ROBERT GEINER,

Movant.

No. 17-8021
(D.C. Nos. 2:08-CV-00038-WFD &
2:05-CR-00063-WFD-1)
(D. Wyo.)

ORDER

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

Robert Geiner, a federal prisoner proceeding pro se, moves for authorization to file a second or successive 28 U.S.C. § 2255 motion. We deny authorization.

Mr. Geiner received a 210-month sentence after pleading guilty to one count of attempted interstate transportation of material containing child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(A) & (b)(1), and one count of possession of child pornography, in violation of § 2252A(a)(5)(B) & (b)(2). This court affirmed on direct appeal. *United States v. Geiner*, 498 F.3d 1104, 1114 (10th Cir. 2007). Mr. Geiner then unsuccessfully sought relief under § 2255. *See United States v. Geiner*, 443 F. App'x 378, 382 (10th Cir. 2011) (denying a certificate of appealability). Mr. Geiner therefore must obtain this court's authorization before he can file another § 2255 motion. *See* 28 U.S.C. § 2255(h).

Mr. Geiner seeks authorization under § 2255(h)(2), which requires him to show his claims rely on “a new rule of constitutional law, made retroactive to cases on

collateral review by the Supreme Court, that was previously unavailable.” He cites to *Johnson v. United States*, 135 S. Ct. 2551, 2557, 2563 (2015), which held that the “residual clause” of the Armed Career Criminal Act (ACCA) was unconstitutionally vague. See *In re Gieswein*, 802 F.3d 1143, 1146 (10th Cir. 2015) (per curiam) (holding that *Johnson* stated a new rule that “a portion of the ACCA violates defendants’ constitutional right to due process”). The Supreme Court made *Johnson* retroactive to cases on collateral review in *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016).

It does not appear that Mr. Geiner proposes to rely on *Johnson*’s invalidation of the residual clause, however, because § 2252A does not contain a residual clause. Further, he fails to identify any particular Guideline that contains a residual clause. Instead, it appears that Mr. Geiner seeks to rely on broader principles of vagueness and the requirements of due process. He proposes to argue that (1) § 2252A is an unconstitutionally vague statute; (2) “any number of the sentencing guidelines enhancements that he received are void for vagueness”; and (3) his sentence “is arbitrary and systematically inconsistent with that received by others in this Circuit.” Memo. Br. at 6. But the doctrine that a statute may be void for vagueness certainly is not a new rule. See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165-71 (1972) (holding vagrancy law void for vagueness); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-05 (1966) (holding statute regarding court costs void for vagueness). Nor is the general principle that a sentence based on an arbitrary distinction would violate the Due Process Clause. See, e.g., *Chapman v. United States*, 500 U.S. 453, 465-66 (1991) (rejecting claim that LSD sentencing was based on impermissible arbitrary distinction). Mr. Geiner’s claims

therefore cannot be considered to be based upon the new rule expressed in *Johnson* and made retroactive in *Welch*, as required by § 2255(h)(2).

For these reasons, Mr. Geiner has failed to satisfy § 2255(h)(2). The motion for authorization is denied. 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