

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-12851-J

IN RE: WINEX EUGENE,

Petitioner.

Application for Leave to File a Second or Successive
Motion to Vacate, Set Aside,
or Correct Sentence, 28 U.S.C. § 2255(h)

Before: MARCUS, WILSON and MARTIN, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A), Winex Eugene has filed an application seeking an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his federal sentence, 28 U.S.C. § 2255. Such authorization may be granted only if we certify that the second or successive motion contains a claim involving:

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) 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). "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." *Id.* § 2244(b)(3)(C); *see also*

Case: 16-12851 Date Filed: 06/17/2016 Page: 2 of 7
Jordan v. Sec'y, Dep't of Corr., 485 F.3d 1351, 1357-58 (11th Cir. 2007) (explaining that this Court's determination that an applicant has made a *prima facie* showing that the statutory criteria have been met is simply a threshold determination).

In his application, Eugene seeks to raise three claims in a second or successive § 2255 motion. In his first claim, Eugene asserts that his conviction for Florida strong-arm robbery is now void as an ACCA predicate. Eugene asserts that this claim relies on a new rule of law, namely *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), in which the Supreme Court held that the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e) is unconstitutionally vague and imposing an enhanced sentence under that provision, therefore, violates due process. In his second claim, Eugene asserts that his Florida felony battery conviction no longer qualifies as an ACCA predicate. He states that this claim is based on a new rule of law, namely, *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257, 194 L. Ed. 2d 387 (2016), which held that *Johnson* is a new rule of substantive law that applies retroactively on collateral review. In his third claim, Eugene argues that his plea waiver was limited and did not bar his claims. Eugene does not indicate whether this claim relies on a new rule of law or newly discovered evidence. In a separate memorandum attached to his application, Eugene states that the ACCA's residual clause is identical to the residual clauses in U.S.S.G. §§ 4B1.1 and 2K2.1, as well as 18 U.S.C. § 924(c), therefore, this Court should apply the *Johnson* analysis to § 924(c).

As an initial matter, although Eugene appears to argue that his sentence was improperly enhanced under the ACCA, the record indicates that Eugene was not sentenced as an armed career criminal, but was sentenced as a career offender under the Sentencing Guidelines. Additionally,

Case: 16-12851 Date Filed: 06/17/2016 Page: 3 of 7
although Eugene's application makes three claims, construed liberally, his arguments are properly summarized as: (1) that his sentence was improperly enhanced under the career offender guideline, and (2) that he was improperly sentenced under 18 U.S.C. § 924(c). We address each of these issues in turn.

Career-Offender Enhancement:

The ACCA defines the term "violent felony" as any crime punishable by a term of imprisonment exceeding one year 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.

18 U.S.C. § 924(e)(2)(B). The first prong of this definition is sometimes referred to as the "elements clause," while the second prong contains the "enumerated crimes" and, finally, what is commonly called the "residual clause." *United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012).

Section 4B1.1 of the Sentencing Guidelines provides that a defendant is classified as a career offender if he (1) was at least 18 years old at the time of the offense of conviction; (2) the offense of conviction was either a crime of violence or a controlled-substance offense; and (3) he had at least two prior felony convictions of either a crime of violence or a controlled-substance offense. U.S.S.G. § 4B1.1(a). The Guidelines define "crime of violence" as any offense under federal or state law that is punishable by imprisonment for more than one year and:

- (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

Case: 16-12851 Date Filed: 06/17/2016 Page: 4 of 7
(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

U.S.S.G. § 4B1.2(a).

On June 26, 2015, the Supreme Court in *Johnson* held that the residual clause of the ACCA is unconstitutionally vague because it creates uncertainty about how to evaluate the risks posed by a crime and how much risk it takes to qualify as a violent felony. *Johnson*, 576 U.S. at __, 135 S. Ct. at 2557-58, 2563. The Supreme Court clarified that, in holding that the residual clause is void, it did not call into question the application of the elements clause and the enumerated crimes of the ACCA's definition of a violent felony. *Id.* at __, 135 S. Ct. at 2563.

This Court then issued our decision in *United States v. Matchett*, 802 F.3d 1185, 1193-96 (11th Cir. 2015), and held that the vagueness doctrine, upon which the Supreme Court invalidated the ACCA's residual clause in *Johnson*, did not similarly apply to advisory Sentencing Guidelines. We explained that the vagueness doctrine applies both to statutes that define elements of crimes and to statutes fixing sentences, but noted that "the advisory guidelines do neither." *Id.* at 1194. We then emphasized that, because the pre-Guidelines sentencing scheme that gave plenary discretion to sentencing judges did not violate the notice requirement of the Due Process Clause, advisory Guidelines that merely "inform a sentencing judge's discretion also cannot violate the notice requirement." *Id.* at 1194-95. We noted that no circuit had held in a published decision that advisory Guidelines could be unconstitutionally vague, though one circuit had stated in *dicta* that the Guidelines could be void for vagueness when they were still mandatory, and in fact, four circuits had held that the Guidelines—whether mandatory or advisory—could not be unconstitutionally vague. *Id.* at 1196. Finally, we explicitly rejected Matchett's policy-based

Case: 16-12851 Date Filed: 06/17/2016 Page: 5 of 7
argument that allowing the identically worded residual clause in § 4B1.2(a) to stand would upend the sentencing process by forcing sentencing courts to apply a clause that *Johnson* determined to lack precise meaning. *Id.* at 1195. We explained that

Although *Johnson* abrogated the previous decisions of the Supreme Court interpreting the residual clause of the Armed Career Criminal Act, sentencing courts interpreting the residual clause of the guidelines must still adhere to the reasoning of cases interpreting the nearly identical language in the Act. [Matchett's] policy concern is properly addressed to the United States Sentencing Commission

Id. at 1195-96.

On April 18, 2016, the Supreme Court held in *Welch* that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. *Welch*, 578 U.S. at ___, 136 S. Ct. at 1263-68. The Court explained that, by striking down the ACCA's residual clause as void for vagueness, *Johnson* changed the ACCA's substantive reach and altered "the range of conduct or the class of persons that the [Act] punishes." *Id.* at ___, 136 S. Ct. at 1265 (brackets in original). Applying the retroactivity framework set forth in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), and its progeny, the Court further stated that *Johnson* was not a procedural decision because it "had nothing to do with the range of permissible methods a court might use to determine whether a defendant should be sentenced under the [ACCA]." *Id.* Accordingly, the Court ruled that "*Johnson* is thus a substantive decision and so has retroactive effect under *Teague* in cases on collateral review." *Id.*

Thereafter, in *In re Griffin*, No. 16-12012, manuscript op. at 7-10 (11th Cir. May 25, 2016), we held that an applicant seeking leave to raise a *Johnson*-based challenge to his career-offender enhancement, which was imposed when the Sentencing Guidelines were mandatory, did not make a *prima facie* showing that his claim satisfied the criteria of

Case: 16-12851 Date Filed: 06/17/2016 Page: 6 of 7
§ 2255(h)(2) because he was not sentenced under the ACCA or beyond the statutory maximum for his crime. In doing so, we concluded that "logic and principles established in *Matchett* also govern . . . when the Guidelines were mandatory." *Id.* at 7. We reasoned that the Guidelines, whether advisory or mandatory, cannot be unconstitutionally vague because they do not establish the illegality of any conduct and are designed to limit and assist the sentencing judge's discretion. *Id.* at 7-8.

Furthermore, we concluded in *Griffin* that the Supreme Court's ruling in *Welch* did not "make[] *Johnson* retroactive for purposes of a second or successive § 2255 motion premised on the applicability of *Johnson* to a guidelines challenge, just because the guidelines challenge happens to be based on the residual clause." *Id.* at 8. We reasoned that, whereas the "application of *Johnson* to the ACCA was a substantive change in the law because it altered the statutory range of permissible sentences," a rule that extended *Johnson* to the residual clause of the Sentencing Guidelines would only establish that the guideline range had been incorrectly calculated within the statutory boundaries. *Id.* at 8-9. Thus, the extension of *Johnson* to a Guidelines context would only create changes in "how the sentencing procedural process is to be conducted—changes that are not entitled to retroactive effect in cases on collateral review in a second or successive § 2255 motion." *Id.* at 9.

Here, Eugene has not satisfied the statutory criteria for filing a successive § 2255 motion. First, even though the Supreme Court has held in *Welch* that *Johnson* applies retroactively to cases on collateral review, our binding precedent holds that *Welch* does not make *Johnson* retroactive for purposes of filing a successive § 2255 motion raising a *Johnson*-based challenge to the Sentencing Guidelines. See *Griffin*, No. 16-12012, manuscript op. at 8-9; *Welch*, 578 U.S. at ___, 136 S. Ct.

Case: 16-12851 Date Filed: 06/17/2016 Page: 7 of 7
at 1264-65. Furthermore, Eugene cannot make a *prima facie* showing that *Johnson* applies to him in light of our holdings in *Matchett* and *Griffin* that the Sentencing Guidelines—whether advisory or mandatory—cannot be unconstitutionally vague. See *Griffin*, No. 16-12012, manuscript op. at 7; *Matchett*, 802 F.3d at 1195. Accordingly, Eugene's application is denied on this ground.

18 U.S.C. § 924(c)

We recently recognized that the question of whether *Johnson* applies to the residual clause in 18 U.S.C. § 924(c) remains unanswered in this circuit. *In re Pinder*, No. 16-12084, manuscript op. at 2 (11th Cir. June 1, 2016). However, regardless of whether *Johnson* applies to the residual clause of § 924(c), Eugene cannot obtain relief. Eugene's plea agreement explained that, as to Count 8, Eugene had committed the drug trafficking crime charged in Count 7 of the indictment and that, during the commission of that offense, he knowingly carried or possessed a firearm in relation to or furtherance of the drug trafficking crime. Accordingly, Eugene's § 924(c) conviction was not premised upon any crime of violence falling under the residual clause or otherwise. Instead, his conviction was premised on his drug trafficking offense. Therefore, even if *Johnson* invalidated § 924(c)'s residual clause, Eugene's conviction was proper.

Accordingly, because Eugene has failed to make a *prima facie* showing of the existence of either of the grounds set forth in 28 U.S.C. § 2255(h), his application for leave to file a second or successive motion is hereby DENIED.

**Additional material
from this filing is
available in the
Clerk's Office.**