

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-10305-G

IN RE: JOE ZIGLAR,

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 MARTIN, ROSENBAUM, and JILL PRYOR, Circuit Judges.

BY THE COURT:

Joe Ziglar seeks authorization to file a second or successive 28 U.S.C. § 2255 motion. He can file such a motion only if the motion is “certified as provided . . . by a panel of the appropriate court of appeals to contain” either

(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).

Ziglar pleaded guilty in 2007 to violating 18 U.S.C. § 922(g). He was then sentenced to 15 years in prison based on the Armed Career Criminal Act (ACCA), which requires a 15-year prison sentence whenever a § 922(g) defendant has three prior “violent felony” convictions. See 18 U.S.C. § 924(e). ACCA gives three definitions of “violent felony.” First, § 924(e)(2)(B)(i) covers any offense that “has as an element the use, attempted use, or threatened use of physical force against the person of another.” This is known as the “elements clause.” Second, § 924(e)(2)(B)(ii) covers any offense that “is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” The first 9 words of that subsection are called the “enumerated crimes clause,” and the last 13 are called the “residual clause.” The Supreme Court held in Johnson v. United States, 576 U.S. ___, 135 S. Ct. 2551 (2015), that ACCA’s “residual clause” is unconstitutional. The Supreme Court has also held that the rule announced in Johnson applies retroactively to cases on collateral review. See Welch v. United States, ___ U.S. ___, 136 S. Ct. 1257 (2016).

Ziglar claims that Johnson and Welch make his ACCA sentence void.

Ziglar's ACCA sentence appears to have been based on his four prior convictions for third-degree burglary under Alabama law. Prior to Johnson, the Supreme Court interpreted ACCA's "residual clause" to cover state burglary offenses. See James v. United States, 550 U.S. 192, 195, 127 S. Ct. 1586, 1590 (2007), overruled by Johnson, 135 S. Ct. 2551. Without the "residual clause," ACCA doesn't cover Ziglar's Alabama burglary convictions. See United States v. Howard, 742 F.3d 1334, 1349 (11th Cir. 2014) (holding that Alabama burglary does not fall under ACCA's "enumerated crimes clause"). Howard applies retroactively on collateral review, so it appears to govern Ziglar's § 2255 proceedings. See Mays v. United States, No. 14-13477, 2016 WL 1211420, at *5 (11th Cir. Mar. 29, 2016). This means Ziglar has made a prima facie showing that Johnson makes his ACCA sentence unlawful because his state convictions no longer count under any of ACCA's definitions of "violent felony." Of course, our "limited determination" here does not bind the District Court, which must decide the case "fresh, or in the legal vernacular, de novo." In re Moss, 703 F.3d 1301, 1302 (11th Cir. 2013). We appoint the Middle District of Alabama Federal Defenders Program as counsel for Joe Ziglar.

APPLICATION GRANTED.