

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

October 2, 2013

FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

In re:

JAMES E. BAKER,

Movant.

No. 13-3223
(D.C. Nos. 6:06-CR-10129-JTM-1 &
6:09-CV-01130-JTM)
(D. Kan.)

ORDER

Before **TYMKOVICH, GORSUCH, and MATHESON**, Circuit Judges.

James E. Baker moves for authorization to file a second-or-successive 28 U.S.C. § 2255 motion challenging the sentence imposed in his 2006 conviction for being a felon in possession of ammunition in violation of 18 U.S.C. § 922(g)(1). Based on his three prior convictions for violent felonies, Baker was sentenced under the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e), and received a sentence of 235 months’ imprisonment. Baker contends that “the district court was without jurisdiction to impose his sentence which is in excess of the maxim[u]m authorized by law.” Mot. for Second or Successive Auth. at 1. We deny authorization.

Baker’s motion cannot proceed in the district court without first being authorized by this court. *See* 28 U.S.C. § 2255(h); *id.* § 2244(b)(3). We may authorize a claim only if the prisoner makes a prima facie showing that the claim relies on (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 [him] 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.” *Id.* § 2255(h)(1)-(2); *see also id.* § 2244(b)(3)(C).

Baker seeks authorization to bring a claim that his 1999 Kansas conviction for burglary cannot be counted as a predicate offense under the ACCA because it does not qualify as a “violent felony” as defined in § 924(e)(2)(B)(ii). He bases this claim on a jury instruction defining aiding and abetting that was used in his state court trial for that offense. He argues that, “[b]ecause aiding and abetting under Kansas Law . . . allows the jury to find guilt ‘regardless of the extent of [Mr. Baker’s] participation, [if any,] in the actual commission of the crime,’ the risk of physical injury to another (a[] requirement of § 924(e)(2)(B)(ii)’s residual clause), is too speculative to allow this conviction to be used to determine ACCA status.” Mot. for Second or Successive Auth. at 2. Subsection (e)(2)(B)(ii) provides that “the term ‘violent felony’ means any crime punishable by imprisonment for a term exceeding one year . . . 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.” Thus, Baker appears to contend that the jury could have found him guilty of burglary only as an aider and abettor, and that crime, as defined, does not

“involve[] conduct that presents a serious potential risk of physical injury to another.” *Id.*

Baker has not satisfied the requirements for authorization under § 2255(h). He says that his argument is based, in part, on *United States v. Martinez*, 602 F.3d 1166 (10th Cir. 2010). But *Martinez* concerned an issue of statutory construction; it did not announce a new rule of constitutional law. We held in *Martinez* that an Arizona conviction for attempted second-degree burglary did not qualify as a violent felony under the residual clause of § 924(e)(2)(B)(ii), based on our construction of that provision and the applicable Arizona statute. *See* 602 F.3d at 1168-73. Our decision in *Martinez* also predated Baker’s most recent motion for authorization filed in August 2011¹; thus, any rule announced in that case was not previously unavailable. Nor do any of the other cases cited in Baker’s motion qualify as “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).

Baker also relies on the cited jury instruction used in his 1999 Kansas burglary conviction. But he fails to show that the instruction is “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

¹ Since that motion for authorization filed in 2011, Baker has filed two unauthorized second-or-successive § 2255 motions in the district court, both of which were dismissed for lack of jurisdiction, and in each case this court denied certificates of appealability. *See United States v. Baker*, 484 F. App’x 258 (10th Cir. 2012) (unpublished); *United States v. Baker*, 718 F.3d 1204 (10th Cir. 2013).

found [him] guilty of the offense.” *Id.* § 2255(h)(1). First, if the instruction was given to the jury in Baker’s state criminal trial in 1999, it is not “newly discovered.” Moreover, it is not evidence showing that Baker is not “guilty of *the offense.*” *Id.* (emphasis added). Rather, Baker seeks to invalidate only his enhanced sentence. In a non-capital case such as this, evidence warranting a sentence reduction is not sufficient to satisfy § 2255(h)(1). *See In re Dean*, 341 F.3d 1247, 1248-49 (11th Cir. 2003) (per curiam) (holding claim asserting sentencing error based on newly discovered evidence did not satisfy § 2255(h)(1)); *In re Vial*, 115 F.3d 1192, 1198 (4th Cir. 1997) (same); *Hope v. United States*, 108 F.3d 119, 120 (7th Cir. 1997) (same); *cf. LaFevers v. Gibson*, 238 F.3d 1263, 1267 (10th Cir. 2001) (noting circuit split and declining “to resolve whether [28 U.S.C.] § 2244(b)(2)(B)(ii) contemplates a claim that a successive petitioner . . . can be innocent of the death penalty”).

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



ELISABETH A. SHUMAKER, Clerk