

FILED

United States Court of Appeals  
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

August 19, 2016

Elisabeth A. Shumaker  
Clerk of Court

In re: BILLY R. MELOT,

Movant.

No. 16-2203  
(D.C. Nos. 2:14-CV-00865-MCA-SMV &  
2:09-CR-02258-MCA-1)  
(D. N.M.)

ORDER

Before **PHILLIPS**, **McHUGH**, and **MORITZ**, Circuit Judges.

Billy R. Melot, a federal prisoner proceeding pro se, seeks authorization to file a second or successive 28 U.S.C. § 2255 motion to vacate, set aside or correct his sentence. Because he has not met the requisite conditions for authorization under § 2255(h), we deny authorization.

Melot was convicted in 2011 of multiple tax-related offenses and making false statements to the United States Department of Agriculture (USDA), in violation of 26 U.S.C. §§ 7201, 7203 and 7212(a), and 15 U.S.C. § 714m(a). We affirmed his convictions on appeal but remanded for resentencing. *See United States v. Melot*, 732 F.3d 1234, 1245 (10th Cir. 2013). On remand, Melot was sentenced to 14 years' imprisonment and ordered to pay restitution to the Internal Revenue Service (IRS) in the amount of \$18,469,998.51 and to the USDA in the amount of \$226,526. In 2014, he unsuccessfully moved to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255.

We may authorize Melot’s § 2255 motion only if it 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.” 28 U.S.C. § 2255(h). He must make a prima facie showing that he can satisfy one of the gate-keeping requirements in § 2255(h). *See In re Shines*, 696 F.3d 1330, 1332 (10th Cir. 2012) (per curiam); *see also* 28 U.S.C. § 2244(b)(3)(C).

Melot first asserts that he has a claim relying 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). He points to the Supreme Court’s holding in *Johnson v. United States*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2551, 2563 (2015), which voided, in part, the definition of a qualifying “violent felony” used for sentence enhancement under the Armed Career Criminal Act. *Johnson* held that a “residual clause” in that definition—covering any crime “involv[ing] conduct that presents a serious potential risk of physical injury to another,” 18 U.S.C. § 924(e)(2)(B)(ii)—violated the constitutional prohibition against vague criminal laws. *Johnson*, 135 S. Ct. at 2563. The Supreme Court made *Johnson*’s holding retroactive to cases on collateral review in *Welch v. United States*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 1257, 1265 (2016).

A prisoner cannot satisfy the requirements of § 2255(h)(2) by the mere citation of a new rule of constitutional law in the abstract. The rule of law must actually be the basis of the claim for which authorization is sought. *In re Encinias*, 821 F.3d 1224, 1225 n.2

(10th Cir. 2016) (per curiam). Here, although Melot has cited *Johnson*, he has not demonstrated any connection between the new rule established in that case and any proposed claim that he asserts in his motion for authorization. He therefore fails to demonstrate a prima facie case for authorization under § 2255(h)(2).

Melot also asserts that he has a claim based on newly discovered evidence. He first points to the district court's sua sponte determination, in a related civil case brought by the United States against him and his spouse, that the IRS had erroneously sought judgment against him for the amount of the couple's total tax liability rather than only half of that liability. *See United States v. Melot*, No. 2:09-CV-00752-JCH-WPL, slip op. at 15 (D.N.M. Oct. 29, 2012), ECF No. 271. Melot maintains that, based on the district court's ruling in the civil case, the tax loss in his criminal case should have been \$8.7 million instead of over \$18 million. But he became aware of the ruling in the civil case when the court issued its order in October 2012, nearly two years before he filed his first § 2255 motion in September 2014. Therefore, even assuming that the district court's decision could be considered "evidence," it is not "newly discovered," as required under § 2255(h)(1).

For this same proposition, Melot also relies on notices he recently received from the IRS setting forth his "unpaid restitution" for the tax periods from 1987 to 1993. Mot., Ex. B. He contends that, according to these IRS notices, his original tax due was approximately \$3.5 million. He asserts that this discrepancy calls into question the validity of the indictment and every stage of the trial proceedings, including the

\$18 million restitution order and his sentence, which was based on the amount of the tax loss.<sup>1</sup>

This evidence also fails to satisfy § 2255(h)(1) because even “if proven and viewed in light of the evidence as a whole,” it would not be “sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [Melot] guilty of the offense.” 28 U.S.C. § 2255(h)(1). While evidence of a lower tax loss could affect Melot’s sentence and the amount of the restitution order, he fails to show that it would have any bearing on establishing his innocence of the offenses charged under 26 U.S.C. §§ 7201, 7203, and 7212(a). *See Case v. Hatch*, 731 F.3d 1015, 1035 (10th Cir. 2013) (stating that “[§] 2255(h)(1) can be read to allow newly discovered evidence to establish a petitioner’s innocence” (internal quotation marks omitted)). As Melot acknowledges, the IRS notices do not state that he had no unpaid tax liability for the relevant years. Consequently, he also fails to demonstrate a prima facie case for authorization under § 2255(h)(1).

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<sup>1</sup> The amount of any discrepancy is unclear because it appears that the \$18 million tax liability alleged in the indictment and calculated for sentencing purposes included penalties and interest, while Melot points only to the original tax amounts as stated in the IRS notices.

Melot's 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", with a long horizontal flourish extending to the right.

ELISABETH A. SHUMAKER, Clerk