

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

July 25, 2016

Elisabeth A. Shumaker
Clerk of Court

In re: CURTIS LEROY ROBERTSON,

Movant.

No. 16-6199
(D.C. Nos. 5:10-CV-00076-C &
5:07-CR-00056-C-1)
(W.D. Okla.)

ORDER

Before **HOLMES**, **EBEL**, and **MORITZ**, Circuit Judges.

Curtis Leroy Robertson was convicted in 2007 of drug and firearms offenses, in violation of 21 U.S.C. §§ 841(a)(1) and 846, and 18 U.S.C. §§ 922(g)(1), 924(c)(1)(A), and 2. He was sentenced to a mandatory term of life imprisonment plus a consecutive term of 60 months' imprisonment. After we affirmed the district court's judgment, Robertson moved unsuccessfully to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. He now seeks authorization to file a second or successive § 2255 motion challenging his sentence.

To obtain authorization, a proposed § 2255 motion must rely 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); *see also id.* § 2244(b)(3)(C). Robertson must make a

prima facie showing that he can satisfy one of these gate-keeping requirements.

See *In re Shines*, 696 F.3d 1330, 1332 (10th Cir. 2012) (per curiam).

Robertson invokes the second prong of § 2255(h), pointing to the Supreme Court’s holding in *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551 (2015). *Johnson* voided, in part, the definition of a qualifying “violent felony” used for sentence enhancement under the Armed Career Criminal Act. *Id.* at 2563. *Johnson* held that a “residual clause” in the definition—covering crimes “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, and that an increased sentence based on that clause violates a defendant’s right to due process. *Johnson*, 135 S. Ct. at 2557, 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). We have extended *Johnson*’s holding to identical residual-clause language used in the definition of a “crime of violence” in the career-offender guideline, U.S. Sentencing Guidelines Manual § 4B1.2(a)(2). See *United States v. Madrid*, 805 F.3d 1204, 1210-11 (10th Cir. 2015).

The new rule of law cited by a movant must be the basis of the claim for which authorization is sought. *In re Encinias*, 821 F.3d 1224, 1225 n.2 (10th Cir. 2016). Here, Robertson cannot demonstrate the requisite connection between his claim and the new rule established in *Johnson*. He challenges a sentence that was enhanced pursuant to 21 U.S.C. § 841(b)(1)(A). That section provides, “If any person commits a violation of this subparagraph . . . after two or more prior convictions for a felony drug offense have

become final, such person shall be sentenced to a mandatory term of life imprisonment without release” *Id.* The government must provide written notice of the prior convictions it intends to rely upon for a sentence enhancement under § 841(b)(1)(A). *See* 21 U.S.C. § 851. Citing *Johnson*, Robertson argues that § 851 is unconstitutionally vague and that the government’s notice under that section was insufficient.

But as he acknowledges, Robertson’s sentence enhancement under § 841(b)(1)(A) was based upon his prior *drug* convictions rather than any “crime of violence,” as that term is defined in USSG § 4B1.2(a)(2). *See* Info. to Notice Prior Convictions at 2, *United States v. Robertson*, No. 5:07-CR-00056-C-1 (W.D. Okla. Apr. 26, 2007), ECF No. 39 (notice under § 851 listing two controlled-substance offenses); Order at 1-2, *United States v. Robertson*, No. 5:07-CR-00056-C-1 (W.D. Okla. Jan. 19, 2010), ECF No. 173 (noting Robertson received a statutory life sentence under § 841(b)(1)(A)).¹ Robertson’s claim does not challenge application of the same residual-clause language invalidated in *Johnson*; he instead challenges a sentence enhancement under § 841 that was clearly predicated on controlled-substance offenses. Thus, his claim is simply not *based on* the holding in *Johnson*, as required for authorization under § 2255(h)(2).

¹ Robertson was also designated as a career offender under USSG § 4B1.1. But he does not challenge that finding, which ultimately had no effect on his sentence due to the mandatory life sentence applicable under 21 U.S.C. § 841(b)(1)(A).

Accordingly, Robertson'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". The signature is written in black ink and includes a long, sweeping horizontal flourish at the end.

ELISABETH A. SHUMAKER, Clerk