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United States Court of Appeals
Tenth Circuit

September 26, 2016

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: ROBERTO BARRIO, Movant.	No. 16-6257 (D.C. Nos. 5:05-CV-00645-R & 5:00-CR-00025-R-2) (W.D. Okla.)

ORDER

Before **TYMKOVICH**, Chief Judge, **EBEL** and **HARTZ**, Circuit Judges.

Roberto Barrio moves for authorization to file a second or successive motion under 28 U.S.C. § 2255. We deny authorization.

Barrio was convicted in 2000 of numerous drug-related offenses, specifically: conspiracy to possess with intent to distribute and distribution of crack cocaine, powder cocaine and PCP, in violation of 21 U.S.C. §§ 841(a)(1) and 846 (Count 1); multiple counts of causing interstate travel in aid of unlawful activity, in violation of 18 U.S.C. § 1952(a)(3); and multiple counts of using a telephone to facilitate cocaine distribution, in violation of 21 U.S.C. § 843(b). Barrio was sentenced to a mandatory life sentence on Count 1 and concurrent imprisonment terms of 60 or 48 months on each of the other counts.

After we affirmed his conviction and sentence on appeal, *see United States v. Barrio*, 41 F. App'x 169, 177 (10th Cir. 2002), Barrio moved unsuccessfully to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. He filed another § 2255 motion

in the district court in June 2016. The district court held it lacked jurisdiction to consider that motion because it was second or successive and had not been authorized by this court. The district court also declined to transfer Barrio's motion to this court. Barrio now seeks authorization to file a second or successive § 2255 motion challenging his sentence.

To obtain authorization, Barrio's 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 [challenged] 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). Barrio 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); *see also* 28 U.S.C. § 2244(b)(3)(C).

Barrio 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 (ACCA). *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 "crime of violence" in the career-offender guideline, U.S. Sentencing Guidelines Manual § 4B1.2(a)(2) (U.S. Sentencing Comm'n).[1] *See United States v. Madrid*, 805 F.3d 1204, 1210-11 (10th Cir. 2015). And we have granted authorization to file a second or successive § 2255 motion challenging a career-offender sentence as "sufficiently based on *Johnson* to permit authorization under § 2255(h)(2)." *In re Encinias*, 821 F.3d 1224, 1226 (10th Cir. 2016) (per curiam).

The requirements of § 2255(h)(2) are not satisfied by the mere citation of a new rule of law in the abstract. The new rule cited by a movant must be the basis of the claim for which authorization is sought. *Id.* at 1225 n.2. Here, Barrio cannot demonstrate the requisite connection between his claims and the new rule established in *Johnson* because, as he acknowledges, his sentence was enhanced based upon his prior *drug* convictions rather than previous convictions for violent felonies or crimes of violence.

First, Barrio's sentence on Count 1 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.* In support of this enhancement, the government filed an

[1] The definition of "crime of violence" in § 4B1.2(a) has recently been amended and no longer includes the invalidated residual-clause language.

information under 21 U.S.C. § 851, stating that Barrio had three prior drug trafficking convictions. *See Barrio*, 41 F. App'x at 175. A claim challenging a sentence enhancement that was clearly predicated on previous drug offenses is not based on the holding in *Johnson*.

Barrio nonetheless maintains that his sentence was enhanced under the career-offender guideline, USSG § 4B1.1. But in declining to transfer his unauthorized second or successive § 2255 motion to this court, the district court stated that it did not appear that Barrio was sentenced pursuant to USSG § 4B1.1. *United States v. Barrio*, No. 5:00-CR-00025-R-2, slip op. at 1-2 (W.D. Okla. Aug. 5, 2016). Barrio asserts error in that conclusion, citing our decision in his direct appeal. But in affirming his sentence, we addressed only his mandatory life sentence under § 841(b)(1)(A). *See Barrio*, 41 F. App'x at 175-76.

Moreover, even if Barrio was designated as a career offender under the guidelines, he does not contend that designation was based on previous convictions for any "crime of violence," as defined in USSG § 4B1.2(a)(2). The career-offender guideline also applies to a defendant who has "two prior felony convictions of . . . *a controlled substance offense*." USSG § 4B1.1(a) (emphasis added). The definition of a "controlled substance offense" does not include the residual-clause language invalidated in *Johnson*, *compare id.* § 4B1.2(a)(2) *with id.* § 4B1.2(b). Thus, Barrio's claim that his previous drug

convictions do not qualify as predicate offenses under § 4B1.2 is, again, not based on the new rule announced in *Johnson*.[2]

Finally, to the extent that Barrio argues that *Johnson* invalidated a portion of the definition of "crime of violence" in 18 U.S.C. § 16(b), he does not show that this definition had any relevance to or effect on his conviction or sentence.

Barrio has not made a prima facie showing that he has a claim based on the new rule of law announced in *Johnson*. Accordingly, his 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

ELISABETH A. SHUMAKER, Clerk

[2] Barrio argues that none of his prior convictions qualifies as a "serious drug offense," presumably referring to the use of that term in the ACCA. But like the definition of "controlled substance offense" in § 4B1.2(b), the ACCA definition of a "serious drug offense" does not include the residual-clause language invalidated in *Johnson*. *See* 18 U.S.C. § 924(e)(2)(A).