

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

September 24, 2015

Elisabeth A. Shumaker
Clerk of Court

In re:

EVERETT BERNARD ROBINSON,

Movant.

No. 15-6153
(D.C. Nos. 5:15-CV-00885-R &
5:07-CR-00072-R-1)
(W.D. Okla.)

ORDER

Before **KELLY, O'BRIEN**, and **GORSUCH**, Circuit Judges.

Everett Bernard Robinson, a federal prisoner, was convicted by a jury of possession of a firearm after a felony conviction, in violation of 18 U.S.C. § 922(g)(1). Robinson has filed a motion seeking authorization to file a second or successive motion under 28 U.S.C. § 2255, to assert a claim under *Johnson v. United States*, 135 S. Ct. 2551 (2015).¹ We deny authorization.

We may authorize Robinson's claim 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 the movant guilty of the offense"; or (2) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme

¹ Robinson filed his first § 2255 motion in 2010, and the district court denied relief. We denied his request for a certificate of appealability and dismissed his appeal.

Court, that was previously unavailable.” 28 U.S.C. § 2255(h); *see also id.*

§ 2244(b)(3)(C). Robinson must make a prima facie showing that he can satisfy the gate-keeping requirements of § 2255(h). *See In re Shines*, 696 F.3d 1330, 1332 (10th Cir. 2012) (per curiam).

Robinson is serving a 180-month sentence on his conviction under § 922(g)(1). He asserts that sentence was improperly enhanced under the Armed Career Criminal Act, 18 U.S.C. § 924(e) (“ACCA”). The ACCA dictates a minimum fifteen-year sentence if the offender violates § 922(g) and has “three previous convictions . . . for a violent felony or a serious drug offense.” *Id.* Robinson maintains that, under the Supreme Court’s recent holding in *Johnson*, two of his three prior felony convictions used to enhance his sentence do not qualify as violent felonies under the ACCA. He seeks authorization to file a second or successive § 2255 motion asserting a claim under *Johnson*, which he contends announced “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).

The ACCA defines “violent felony” as including “any crime punishable by imprisonment for a term exceeding one year . . . that . . . involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B)(ii). This portion of the definition of “violent felony” is commonly referred to as the “residual clause.” *Johnson*, 135 S. Ct. at 2556. The Supreme Court held in *Johnson* that enhancing a sentence under the residual clause violates a

defendant's right to due process because that portion of the ACCA is unconstitutionally vague. *See id.* at 2557, 2563.

Robinson has not made a prima facie showing that he can satisfy the gate-keeping requirements of § 2255(h). He is correct that *Johnson* announced a new rule of constitutional law. *See In re Gieswein*, No. 15-6138, __ F.3d __, 2015 WL 5534388, at *2 (10th Cir. Sept. 21, 2015) (per curiam). But “[t]he Supreme Court has not held in one case, or in a combination of holdings that dictate the conclusion, that the new rule of constitutional law announced in *Johnson* is retroactive to cases on collateral review.” *Id.* at *5.

Accordingly, we deny Robinson's motion seeking authorization to file a second or successive § 2255 motion. 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".

ELISABETH A. SHUMAKER, Clerk