

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

June 2, 2016

Elisabeth A. Shumaker
Clerk of Court

In re: QUINCY DARNELL BLUE,

Movant.

No. 16-3150
(D.C. Nos. 6:09-CV-01108-WEB &
6:03-CR-10058-WEB-1)
(D. Kan.)

ORDER

Before **KELLY, HARTZ, and MATHESON**, Circuit Judges.

Quincy Darnell Blue was convicted of armed bank robbery and knowingly carrying or using a firearm during and in relation to a crime of violence. His sentence was enhanced under the career-offender guideline, U.S.S.G. § 4B1.1. He now seeks authorization to file a second or successive 28 U.S.C. § 2255 motion, challenging application of the guideline as contrary to *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551 (2015), which voided in part the definition of qualifying “violent felonies” used for sentence enhancement under the Armed Career Criminal Act (ACCA). *Johnson* held a “residual clause” in the 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 of vague criminal laws. *Johnson*, 135 S. Ct. at 2563. The career-offender guideline contains an identical residual clause for its definition of “crime of violence,” U.S.S.G § 4B1.2(a)(2), which this court recently held invalid by extension of *Johnson*’s holding to the guideline context, *see*

United States v. Madrid, 805 F.3d 1204, 1210-11 (10th Cir. 2015). For reasons explained below, however, none of this avails Mr. Blue here.

To obtain authorization, Mr. Blue must make a *prima facie* showing that his proposed § 2255 motion 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 [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); *see also id.* § 2244(b)(3)(C). Mr. Blue contends *Johnson*’s holding striking down the residual clause in the ACCA, which was recently made retroactive to cases on collateral review in *Welch v. United States*, ___ U.S. ___, 136 S. Ct. 1257, 1265-66 (2016), satisfies the second prong of this test. *Johnson* can indeed provide the basis for authorization of a challenge to the career-offender guideline under § 2255(h)(2), *see, e.g., In re Encinias*, ___ F.3d ___, No. 16-8038, 2016 WL 1719323 (10th Cir. Apr. 29, 2016) (per curiam), but pertinent circumstances here undermine any reliance on *Johnson*.

The career-offender guideline can be satisfied by “two prior felony convictions of either a crime of violence or a controlled substance offense.” U.S.S.G. § 4B1.1(a). While the definition of a crime of violence uses the invalidated residual clause, the definition of a controlled-substance offense does not. *Compare id.* § 4B1.2(a)(2) with *id.* § 4B1.2(b). Mr. Blue alleges that the sentencing court improperly relied on two prior convictions for escape as qualifying crimes of violence under the residual clause of the guideline. In an earlier motion for relief under § 2255, he challenged the use of the

same prior convictions as contrary to *Chambers v. United States*, 555 U.S. 122 (2009). While the substance of that challenge is not pertinent here, the district court’s resolution of it is significant. The district court did not reach the merits of the *Chambers* claim, because other convictions sufficed to justify the career-offender sentence enhancement: “Even assuming [Mr. Blue] could show that his escape convictions should not have counted as crimes of violence, . . . the record shows that at the time of sentencing he had two prior controlled substance convictions that would count toward career offender status. [He] was thus appropriately sentence as a career offender, and the alleged error of which he complains could have made no difference in the sentence he received.” *United States v. Blue*, D. Kan. No. 6:03-cr-10058, Doc. 118 at 8 (Aug. 20, 2009). Thus, the district court—the same court that sentenced Mr. Blue—held the career-offender enhancement properly applied to him on the basis of prior controlled-substance offenses that *Johnson* did not call into question.

The requirements of § 2255(h)(2) are not satisfied by the mere citation of a new rule of law in the abstract. The rule of law must actually be the basis of the claim for which authorization is sought. *In re Encinias*, 2016 WL 1719323, at *1 n.2. Thus, we have an obligation, and the commensurate authority, to assess whether a new rule of law invoked by a prisoner has a sufficient connection to his case. Exercising this authority we conclude that, in light of the district court’s comments in the prior § 2255 proceeding, Mr. Blue cannot demonstrate the requisite connection between his claim and the new rule established in *Johnson*. A claim challenging a career-offender enhancement predicated

on controlled-substance offenses is simply not *based on* the holding in *Johnson*, as required for authorization under § 2255(h)(2).

Mr. Blue'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", followed by a long horizontal flourish.

ELISABETH A. SHUMAKER, Clerk