APPENDIX

FILED
United States Court of Appeals
Tenth Circuit

October 21, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. CHAD EUGENE CALDWELL, Defendant - Appellant.	No. 21-4026 (D.C. Nos. 2:16-CV-00607-DAK & 2:03-CR-00325-DAK-1 & 2:03-CR-00696-DAK-1) (D. Utah)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MORITZ**, **BALDOCK**, and **EID**, Circuit Judges.

Chad Caldwell seeks a certificate of appealability (COA) to appeal an order denying his 28 U.S.C. § 2255 motion as untimely. Because reasonable jurists would not find the district court's procedural ruling debatable, we deny Caldwell's request and dismiss this matter.

Caldwell's § 2255 motion stems from his federal convictions for armed bank robbery and an associated firearm offense. When pleading guilty to those offenses in 2003, Caldwell stipulated that he would be sentenced as a career offender because his criminal history included two crimes of violence. *See* U.S.S.G. §§ 4B1.1(a), 4B1.2(a).

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

This stipulation increased Caldwell's offense level, producing a higher sentencing range under the then-mandatory United States Sentencing Guidelines. Caldwell ultimately received a 272-month prison term and did not appeal his convictions or sentence.

Over a decade later, Caldwell moved to vacate his sentence under § 2255. Relevant here, Caldwell's motion asserted that one of the prior convictions that supported his career-offender status—a California burglary offense—no longer qualified as a "crime of violence" under U.S.S.G. § 4B1.2(a)(2) after the Supreme Court's decision in *Johnson v. United States*, which invalidated an identically worded statutory definition as unconstitutionally vague. 576 U.S. 591, 597, 606 (2015). The district court dismissed the motion as untimely, alternatively concluded that any error in Caldwell's sentence was harmless, and declined to issue a COA.

Caldwell now seeks a COA from this court so he can appeal the district court's order dismissing his motion. *See* 28 U.S.C. § 2253(c)(1)(B). Because the district court dismissed Caldwell's motion on procedural grounds, we can grant that request only if Caldwell shows that reasonable jurists could debate both the district court's procedural ruling and the validity of his constitutional claim. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As explained below, Caldwell has not made this showing as to the district court's procedural ruling.

The district court based its procedural ruling on the timeliness of Caldwell's motion. Specifically, it determined that Caldwell filed the motion more than one year after the judgment became final in his underlying criminal case. *See* § 2255(f)(1). As in the district court, Caldwell argues that his motion was timely because he filed it within

one year of *Johnson*, which he says announced a new constitutional rule that applies retroactively on collateral review. *See* § 2255(f)(3); *Welch v. United States*, 136 S. Ct. 1257, 1264–65 (2016) (holding that *Johnson* applies retroactively). But we have held that *Johnson* did not create a new constitutional rule as applied to the mandatory Guidelines. *United States v. Pullen*, 913 F.3d 1270, 1283 (10th Cir. 2019). And while other circuits may have taken a different view, the district court, as Caldwell recognizes, "was bound by this court's contrary holding[]." Aplt. Br. 6. Thus, reasonable jurists could not debate the district court's ruling that Caldwell's motion was untimely because he filed it more than one year after his conviction became final.

Nor could they debate whether Caldwell can overcome this untimeliness by proving actual innocence. To invoke the actual-innocence exception to the one-year filing deadline, Caldwell must show based on new evidence that "it is more likely than not that no reasonable juror would have *convicted* him." *McQuiggin v. Perkins*, 569 U.S. 383, 399 (2013) (emphasis added) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). But Caldwell does not argue that he is innocent of his underlying crimes; he argues that he is innocent of "being a career offender" under the Guidelines. That argument affects Caldwell's *sentence*, and in this circuit, "[a] person cannot be actually innocent of a noncapital sentence."[1] *United States v. Richards*, 5 F.3d 1369, 1371 (10th Cir. 1993). Caldwell suggests that an exception to this rule applies when a person is "innocent of the

[1] For this reason, it makes no difference whether, as Caldwell argues, "a change in the law can be the basis for a factual[-]innocence claim." Aplt. Br. 11. Even if that's true, the change in law asserted here impacts Caldwell's sentence and thus cannot establish actual innocence. *See Richards*, 5 F.3d at 1371.

fact—i.e., the prior conviction—necessary to sentence [that person] as a[] habitual offender." *Selsor v. Kaiser*, 22 F.3d 1029, 1036 (10th Cir. 1994). Yet even if such an exception exists, it would not apply here: Caldwell contends that his California burglary offense no longer qualifies as a "crime of violence" under the Guidelines, not that he did not commit that offense in the first place. Caldwell cites no authority from this court suggesting that a sentencing argument of that kind constitutes actual innocence.[2]

In sum, Caldwell fails to show that reasonable jurists could debate the district court's procedural ruling that his § 2255 motion is untimely and does not assert an actual-innocence claim. We therefore decline Caldwell's COA request and dismiss this matter. *See Slack*, 529 U.S. at 484.

Entered for the Court

Nancy L. Moritz
Circuit Judge

[2] Contrary to Caldwell's view, *Richards* itself did not "acknowledge[] that 'one might be actually innocent of a sentence in some circumstances.'" Aplt. Br. 8 (quoting *Richards*, 5 F.3d at 1371). The language Caldwell quotes comes from a parenthetical attached to a "But see" cite that notes the Eighth Circuit's *opposing* view. *See Richards*, 5 F.3d at 1371 (citing *Jones v. Arkansas*, 929 F.2d 375, 381 & n.16 (8th Cir. 1991)). But *Richards* rejected that view and instead held that "[a] person cannot be actually innocent of a noncapital sentence." *Id.*

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CHAD EUGENE CALDWELL, **Petitioner,** **vs.** **UNITED STATES OF AMERICA,** **Respondent.**	**MEMORANDUM DECISION AND ORDER** **Case No. 2:16CV607DAK** **Judge Dale A. Kimball**

On June 13, 2016, Petitioner filed a Motion to Vacate Sentence under 28 U.S.C. § 2255 based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). In his underlying criminal case, Petitioner pleaded guilty to Armed Bank Robbery in violation of 18 U.S.C. § 2113(a) & (d) and Brandishing a Firearm During the Commission of a Crime of Violence, a violation of 18 U.S.C. § 924(c)(1)(A). Case No. 2:03CR325DAK, ECF No. 17. In a companion case transferred from California, 2:03CR696, Petitioner pleaded guilty to bank robbery in violation of 18 U.S.C. § 2113(a), and acknowledged in his plea agreement that he had two prior convictions for felony crimes of violence. The court sentenced Petitioner on both cases jointly to a combined 360 months incarceration.

Given the large number of § 2255 motions filed in relation to *Johnson* and the need to receive guidance from higher courts on *Johnson*'s application to other statutes, this court stayed the case based on the district-wide General Order 16-002. On October 9, 2020, Petitioner filed

an Amended Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255. Petitioner's amended motion dropped his § 924(c) challenge and focused on his challenge to being sentenced as a career offender under the residual clause of USSG § 4B1.2. Petitioner admits that a prior bank robbery was a crime of violence, but he asserts that a prior conviction for burglary under California law does not qualify on as a prior crime of violence without the residual clause.

The government opposes Petitioner's Amended Motion on the grounds that it is untimely. Under Tenth Circuit precedents, a 22 motion challenging the application of the residual clause of the career offender provision of the then-mandatory Sentencing Guidelines is untimely when filed within one year of *Johnson* because *Johnson* did not create a new rule of constitutional law applicable to the mandatory Sentencing Guidelines. *United States v. Pullen*, 913 F.3d 1270, 1285 (10th Cir. 2019); *United States v. Greer*, 881 F.3d 1241, 1248 (10th Cir. 2018). "The Court did not consider in *Johnson*, and has still not decided, whether the mandatory Guidelines can be challenged for vagueness in the first instance, let alone, whether such a challenge would prevail. And it is not for this court acting on collateral review to do so." *Greer*, 881 F.3d at 1248. The court is bound by this Tenth Circuit precedent.

Petitioner, however, argues that the untimeliness of his motion may be excused because he is actually innocent of the recidivist enhancement. Petitioner does not claim to be innocent of any of the crimes he admits to committing, only the career offender enhancement. But actual innocence "means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). The tenth Circuit has held that "[p]ossible misuse of a prior conviction as a predicate offense under the sentencing guidelines does not demonstrate actual

innocence." *Sandlain v. English*, 714 F. App'x 827, 831 (10th Cir. 2017) (unpublished); *United States v. Williams*, 799 F. App'x 657, 658 (10th Cir.) (Unpublished), *cert. Denied*, 140 S. Ct. 2840 (2020) (stating that defendant does not establish actual innocence for purposes of equitable tolling of § 2255's one-year limitation period by claiming that his prior state convictions should not have been considered crimes of violense under the Armed Career Criminal Act).

Petitioner cannot rely on *McQuiggin v. Perkins*, 569 U.S. 383 (2013), to assert that actual innocence tolls the time for filing his motion because *McQuiggin* does not extend beyond capital sentences. *United States v. Robinson*, 2013 WL 5874012, at *3 (D. Kkan. Oct. 30, 2013). Likewise, *Selsor v. Kaiser*, 22 F.3d 1029 (10th Cir. 1994), does not help Petitioner because it requires factual innocence. Petitioner does not claim he is factually innocent of his California burglary. The court, therefore, finds that there are not grounds for equitably tolling the one-year statute of limitations.

Moreover, Petitioner asked the court to sentence him to 360 months on both cases in order to avoid the much longer three-strikes sentence he was facing in California state court. Any error in application of the prior conviction was harmless because it did not substantially influence his sentence.

Pursuant to Rule 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts, "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Under 28 U.S.C. § 2253, a certificate of appealability "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *United States v. Silva*, 430 F.3d 1096, 1100 (10th

Cir. 2005) (quoting 28 U.S.C. § 2253(c)(2)). The court finds that "reasonable jurists could not debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). The court, therefore, declines to issue a Certificate of Appealability. If Petitioner wishes to appeal the court's ruling on his motion, he must seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22.

Based on the above analysis, the court denies Petitioner's § 2255 motion and dismisses this action. The court further denies a certificate of appealability.

DATED this 9th day of February, 2021.

BY THE COURT:

DALE A. KIMBALL
United States District Judge