

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

July 26, 2016

Elisabeth A. Shumaker
Clerk of Court

In re: ABEL SANCHEZ-LEON,

Movant.

No. 16-1273
(D.C. Nos. 1:15-CV-01801-REB &
1:11-CR-00412-REB-DW-2)
(D. Colo.)

ORDER

Before **BRISCOE**, **EBEL**, and **McHUGH**, Circuit Judges.

Abel Sanchez-Leon, a federal prisoner proceeding pro se, seeks authorization to file a second or successive 28 U.S.C. § 2255 motion to vacate, set aside or correct his sentence. Because he has not met the requisite conditions for authorization under § 2255(h), we deny authorization.

We may authorize Sanchez-Leon’s motion 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 Court, that was previously unavailable.” 28 U.S.C. § 2255(h); *see also id.* § 2244(b)(3)(C). He 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).

Sanchez-Leon pled guilty to drug and firearms offenses in 2013 and was sentenced to 295 months' imprisonment. We affirmed his conviction and sentence on appeal. *See United States v. Sanchez-Leon*, 764 F.3d 1248, 1253 (10th Cir. 2014). He filed a pro se first § 2255 motion in August 2015, contending that his counsel provided ineffective assistance in connection with his guilty plea by coercing him into pleading guilty. The government filed a reply to the § 2255 motion, which remains pending in the district court. Sanchez-Leon has not sought leave to amend his first § 2255 motion to add the claims identified in his motion for authorization.¹ Because he does not argue that his proposed § 2255 motion is not a second § 2255 motion, we proceed to consider whether he has satisfied the gatekeeping requirements in § 2255(h).

Sanchez-Leon seeks authorization to file a claim asserting that he is actually innocent of the offense of possession of a firearm during and in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(a). He further maintains that his counsel rendered ineffective assistance by erroneously advising him that he was guilty of this offense, resulting in an involuntary and unintelligent guilty plea. Sanchez-Leon argues that these claims are based on a new rule of constitutional law announced in *Bailey v. United States*, 516 U.S. 137 (1995), which, he asserts, applies retroactively to cases on collateral review.

¹ We do not opine on whether Sanchez-Leon's pending first § 2255 motion is subject to amendment. *See generally, United States v. Espinoza-Saenz*, 235 F.3d 501, 503-505 (10th Cir. 2000) (discussing timeliness of motion to amend § 2255 motion and relation back under Fed. R. Civ. P. 15(c)); *United States v. Tony*, 637 F.3d 1153, 1157 & nn.7 & 8 (10th Cir. 2011) (affirming denial of untimely motion to amend § 2255 motion deemed to be an unauthorized second or successive § 2255 motion).

Bailey held that the “use” prong of § 924(c)(1) requires evidence sufficient to show that a defendant actively employed a firearm. *Id.* at 143. But *Bailey* did not announce a rule of *constitutional* law. See *Welch v. United States*, 136 S. Ct. 1257, 1267 (2016) (describing the Court’s holding as “a matter of statutory interpretation”). And *Bailey* was decided in 1995, 18 years before Sanchez-Leon’s conviction. Consequently, its ruling is neither “new” nor was it “previously unavailable” to Sanchez-Leon. Moreover, *Bailey* has been superseded by statute. See *id.*

To the extent Sanchez-Leon argues, alternatively, that we should authorize his claims because they are based on an assertion of actual innocence, he fails to satisfy the other prong of § 2255(h) because he has not identified any “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,” 28 U.S.C. § 2255(h)(1). Rather, he affirmatively states that his claims are *not* based upon new evidence.

Accordingly, we deny Sanchez-Leon’s motion for authorization. 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