

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

September 11, 2018

Elisabeth A. Shumaker
Clerk of Court

In re: RICHARD POWELL,

Movant.

No. 18-1332
(D.C. Nos. 1:96-CV-01316-LTB &
1:94-CR-00108-LTB-1)
(D. Colo.)

ORDER

Before **MATHESON, PHILLIPS, and McHUGH**, Circuit Judges.

Richard Powell, 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 made the requisite showing under § 2255(h), we deny authorization.

Powell pleaded guilty in 1994 to using or carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c). He was sentenced to 60 months' imprisonment. The district court denied Powell relief on his first § 2255 motion. We granted him a certificate of appealability, but affirmed the denial of relief on appeal. *United States v. Powell*, 159 F.3d 500, 501, 504 (10th Cir. 1998). Powell was subsequently convicted on other charges, and he is currently serving six concurrent life sentences on those convictions. *See United States v. Powell*, 220 F. App'x 805, 808, 813 (10th Cir. 2007).

Powell seeks authorization to file a claim that he is actually innocent of his 1994 conviction under § 924(c). We may authorize Powell’s second or successive § 2255 motion only if it satisfies one of the gate-keeping requirements in § 2255(h). He contends that his proposed claim relies on “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); *see also id.* § 2244(b)(3)(C). Powell must make a *prima facie* showing that he can satisfy § 2255(h)(2). *See In re Shines*, 696 F.3d 1330, 1332 (10th Cir. 2012) (*per curiam*).

Powell asserts that his claim relies on the new rule of constitutional law announced in *Johnson v. United States*, 135 S. Ct. 2551 (2015). In *Johnson*, the Supreme Court held that “imposing an increased sentence under the residual clause of the Armed Career Criminal Act [ACCA] violates the Constitution’s guarantee of due process.” 135 S. Ct. at 2563. And in *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016), the Court held that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. Powell contends that his claim also relies on *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018), in which the Supreme Court invalidated a similarly worded residual clause in the definition of “crime of violence” in 18 U.S.C. § 16(b) in light of its reasoning in *Johnson*. In his proposed § 2255 motion, Powell notes that this court has applied the reasoning in *Dimaya* in holding that a similar residual clause in the definition of “crime of violence” in § 924(c)(3)(B) is also unconstitutionally vague. *United States v. Salas*, 889 F.3d 681, 686 (10th Cir. 2018).

Powell fails to make a prima facie showing that his proposed claim relies on “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” § 2255(h)(2); see *United States v. Murphy*, 887 F.3d 1064, 1067 (10th Cir. 2018) (“A motion contains a new rule of constitutional law, as required by § 2255(h)(2), if the claim for which authorization is sought relies on the new rule.” (internal quotation marks omitted)). Powell was not sentenced under the ACCA. He was convicted under § 924(c) for using or carrying a firearm during and in relation to a *drug trafficking crime*, as defined in § 924(c)(2), rather than a crime of violence, as defined in § 924(c)(3)(B). Therefore, neither *Johnson*’s invalidation of the ACCA residual clause, nor *Dimaya*’s invalidation of a portion of the definition of “crime of violence” in § 16(b), nor this court’s application of *Dimaya* to invalidate a similar residual clause in the definition of “crime of violence” in § 924(c)(3)(B), bears any relevance to Powell’s proposed claim challenging his § 924(c) conviction for using or carrying a firearm during and in relation to a drug trafficking crime.

Accordingly, the 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 horizontal line.

ELISABETH A. SHUMAKER, Clerk