

FILED

**United States Court of Appeals
Tenth Circuit**

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

March 2, 2023

**Christopher M. Wolpert
Clerk of Court**

In re: DEMETRIUS R. HARGROVE,

Movant.

No. 23-3022
(D.C. Nos. 2:12-CV-02180-CM &
2:03-CR-20192-CM-1)
(D. Kan.)

ORDER

Before **HOLMES**, Chief Judge, **KELLY** and **EID**, Circuit Judges.

Demetrius R. Hargrove, proceeding pro se, seeks authorization to file a second or successive 28 U.S.C. § 2255 motion. We deny authorization.

Mr. Hargrove was convicted of three counts of murder and one count of conspiracy to kill and attempt to kill a person with the intent of preventing that person from testifying in an official proceeding. He was sentenced to life imprisonment without the possibility of release, and we affirmed the judgment on direct appeal. He then filed a § 2255 motion. The district court denied the motion, and we denied a certificate of appealability.

Mr. Hargrove now seeks authorization to file a second or successive § 2255 motion to bring a claim that his Sixth Amendment rights under the Confrontation Clause were violated when the trial court permitted a transcript from a witness's testimony at a previous state court hearing to be admitted against him. He bases his claim on the Supreme Court's recent decision in *Hemphill v. New York*, 142 S. Ct. 681 (2022). In

Hemphill, the Supreme Court held that the trial court’s admission of the plea allocution transcript of an unavailable witness violated the defendant’s Sixth Amendment right to confront the witnesses against him. *Id.* at 686.

To be entitled to authorization, Mr. Hargrove must 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.” 28 U.S.C. § 2255(h)(2); *see also id.* § 2244(b)(3)(C). We need not decide, however, whether *Hemphill* announced a new rule of constitutional law because Mr. Hargrove has failed to show that the Supreme Court has made *Hemphill* retroactive to cases on collateral review.

We have explained that “[u]nder § 2255(h)(2), the Supreme Court is the only entity that can make a new rule retroactive. And the Supreme Court can only make a rule retroactively applicable through a holding to that effect.” *In re Gieswein*, 802 F.3d 1143, 1146 (10th Cir. 2015) (ellipsis, internal quotation marks, and citations omitted).

Mr. Hargrove argues that the rule in *Hemphill* has been made retroactive to cases on collateral review under the doctrine in *Teague v. Lane*, 489 U.S. 288 (1989). But we have further explained “it is clear that the mere fact a new rule might fall within the general parameters of overarching retroactivity principles established by the Supreme Court (i.e., *Teague*) is not sufficient.” *Gieswein*, 802 F.3d at 1146. “Thus, in the context of deciding a motion for authorization, it is not this court’s task to determine whether (or not) a new rule fits within one of the categories of rules that the Supreme Court has held

apply retroactively.” *Id.* Instead, “[o]ur inquiry is statutorily limited to whether the Supreme Court has made the new rule retroactive to cases on collateral review.” *Id.*

Because Mr. Hargrove has not shown the Supreme Court has made *Hemphill* retroactive to cases on collateral review, he cannot meet the standard for authorization in § 2255(h)(2). Accordingly, we deny his 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 black ink, appearing to read 'C. M. Wolpert', with a long horizontal stroke extending to the right.

CHRISTOPHER M. WOLPERT, Clerk