

June 11, 2010

UNITED STATES COURT OF APPEALS

Elisabeth A. Shumaker
Clerk of Court

FOR THE TENTH CIRCUIT

In re:

BRIAN MADDOX,

Movant.

No. 10-2040
(D.C. Nos. 1:06-CV-00250-JAP-LCS
and 1:02-CR-01592-JAP-1)
(D. N.M.)

ORDER

Before **BRISCOE**, Chief Judge, **MURPHY**, and **HARTZ**, Circuit Judges.

Brian Maddox seeks authorization to file a second or successive 28 U.S.C. § 2255 motion to vacate, set aside or correct his sentence. Because Mr. Maddox has not demonstrated that his proposed motion meets the requisite conditions under § 2255(h), we deny authorization and dismiss the proceeding. We also deny his alternative request to remand this matter to the district court.

Mr. Maddox pleaded guilty to one count of being a felon in possession of a firearm, and was sentenced to 188 months' imprisonment. His conviction and sentence were affirmed on appeal. *United States v. Maddox*, 388 F.3d 1356, 1358 (10th Cir. 2004). In March 2006, Mr. Maddox filed his first § 2255 motion, which the district court denied in August 2006. Three years later, Mr. Maddox filed a motion to vacate that judgment, which the district court construed as an

unauthorized second or successive motion and dismissed for lack of jurisdiction. This court dismissed his appeal from that order for lack of prosecution. *United States v. Maddox*, No. 09-2134 (10th Cir. Nov. 30, 2009).

In May 2009, Mr. Maddox filed a petition for writ of audita querela in the district court. The district court concluded that Mr. Maddox's petition sought to challenge the validity of his sentence, and it therefore construed it as an unauthorized second or successive § 2255 motion and transferred it to this court. *See In re Cline*, 531 F.3d 1249, 1252 (10th Cir. 2008) (per curiam) (permitting district courts to transfer unauthorized second or successive motions to this court in the interest of justice pursuant to 28 U.S.C. § 1631). Mr. Maddox now seeks authorization to file a second or successive § 2255 motion.

In order to receive authorization, Mr. Maddox must show that there is either:

(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). In his motion, Mr. Maddox argues that he is entitled to a sentence reduction based on a "new rule of law," citing to *Chambers v. United States*, 129 S. Ct. 687 (2009). Mr. Maddox's sentence was enhanced based on his

prior failure to return to prison. At the time he was sentenced, that offense was treated as a “violent felony” under the Armed Career Criminal Act, *see* 18 U.S.C. § 924(e)(1); *Maddox*, 388 F.3d at 1368-69 (holding his failure to return was properly treated as a violent felony under circuit precedent). In *Chambers*, the Supreme Court held that a failure-to-report charge under state law was not a violent felony within the terms of the Armed Career Criminal Act. 129 S. Ct. at 690-92. Mr. Maddox further cites to *United States v. Shipp*, 589 F.3d 1084, 1091 (10th Cir. 2009), in which we held that the *Chambers* decision applies retroactively to cases on collateral review.

Although *Chambers* is a Supreme Court decision that was previously unavailable, it does not satisfy the standard for authorization under § 2255(h)(2). First, *Chambers* did not set forth “a new rule of constitutional law,” *id.*, instead it resolved a question of statutory interpretation. 129 S. Ct. at 690-93. Second, to date, the Supreme Court has not held that its holding in *Chambers* should be “made retroactive to cases on collateral review,” § 2255(h)(2); *see also Tyler v. Cain*, 533 U.S. 656, 663 (2001) (“[A] new rule is not made retroactive to cases on collateral review unless the Supreme Court holds it to be retroactive.” (quotation omitted)).

Alternatively, Mr. Maddox argues, for the first time in his reply brief, that the district court should not have construed his writ of audita querela as a successive § 2255 motion, and he asks this court to remand the matter to the

district court to rule on his writ. Remand is not warranted, however, because Mr. Maddox cannot obtain the relief he desires through a writ of audita querela. “[A] writ of audita querela is used to challenge a judgment that was correct at the time rendered but which is rendered infirm by matters which arise after its rendition.” *United States v. Torres*, 282 F.3d 1241, 1245 n.6 (10th Cir. 2002) (internal quotation marks omitted). Although the writ has been abolished in civil cases, Fed. R. Civ. P. 60(e), we acknowledged in *Torres* that, at least theoretically, audita querela may afford post-conviction relief to a criminal defendant. *Torres*, 282 F.3d at 1245 n.6. However, “a writ of audita querela is not available to a petitioner when other remedies exist, such as a motion to vacate sentence under 28 U.S.C. § 2255” or a writ of habeas corpus under 28 U.S.C. § 2241. *Id.* at 1245 (internal quotation marks omitted). The mere fact that Mr. Maddox is procedurally precluded from filing a second 2255 motion does not establish that the remedy in § 2255 is inadequate, *see Carvalho v. Pugh*, 177 F.3d 1177, 1179 (10th Cir. 1999), and Mr. Maddox does not present any argument in his reply brief as to why a possible § 2241 remedy is inadequate or ineffective. *See* 28 U.S.C. § 2255(e). We decline to decide whether or not any post-conviction remedy under § 2241 is available to address Mr. Maddox’s *Chambers* claim. Thus, we deny his request for remand.

Because Mr. Maddox has not satisfied the standards in § 2255(h), his motion for authorization to file a second or successive § 2255 motion is DENIED.

This denial of authorization is not 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). We note, however, that this denial does not preclude Mr. Maddox from filing a new petition under 28 U.S.C. § 2241 asserting that there is no adequate or effective relief available under § 2255 for his *Chambers* claim. See 28 U.S.C. § 2255(e). Further, this denial is without prejudice to Mr. Maddox’s right to raise his *Chambers* claim in a subsequent motion for authorization under § 2255(h) if the Supreme Court makes its holding in *Chambers* retroactive to cases on collateral review. This matter is DISMISSED.

Entered for the Court,



ELISABETH A. SHUMAKER, Clerk