

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

June 12, 2013

FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

In re: JUPITER LAMAR ROGERS,

Movant.

No. 13-6104
(D.C. Nos. 5:13-CV-00369-C &
5:07-CR-00056-C-2)
(W.D. Okla.)

ORDER

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

On April 15, 2013, Jupiter Lamar Rogers filed a 28 U.S.C. § 2255 motion seeking to correct or vacate his sentence. The district court transferred the motion to this court based on its determination that the motion was a second or successive § 2255 motion that was filed without the requisite authorization. Mr. Rogers has now filed a motion asking this court to remand his § 2255 motion to the district court to be considered on the merits. We deny the motion for remand.

In 2007, Mr. Rogers was convicted by a jury of committing several drug trafficking and firearm crimes. He appealed and we affirmed his convictions on all counts. *See United States v. Rogers*, 556 F.3d 1130, 1144 (10th Cir. 2009). In 2010, Mr. Rogers filed a § 2255 motion to vacate, correct or set aside his sentence. The district court denied the motion and we denied Mr. Rogers's request for a certificate of appealability. *See United States v. Rogers*, 425 F. App'x 773, 774 (10th Cir. 2011).

Mr. Rogers has now filed a second § 2255 motion that seeks to challenge his convictions and sentence. The district court correctly determined that this motion was a second or successive § 2255 motion because Mr. Rogers had previously filed a § 2255 motion challenging his convictions and sentence that was decided on the merits. *See Corrao v. United States*, 152 F.3d 188, 191 (2d Cir. 1988) (“Generally, a § 2255 petition is ‘second or successive’ if a prior § 2255 petition, raising claims regarding the same conviction or sentence, has been decided on the merits.”).

The governing law for second or successive claims was established in the Antiterrorism and Effective Death Penalty Act (AEDPA). As we explained after ADEPA was enacted:

[AEDPA] amends 28 U.S.C. §§ 2244 and 2255, altering the procedures for filing habeas petitions under § 2254 and § 2255 motions. The statutes now require a movant who seeks to file a second or successive motion to first apply to the appropriate court of appeals for an order authorizing the district court to consider the successive motion.

Coleman v. United States, 106 F.3d 339, 340 (10th Cir. 1997) (per curiam).

We notified Mr. Rogers that he could file a motion for authorization or, if he thought the district court had wrongly characterized his motion as a second or successive § 2255 motion, he could file a motion for remand. Mr. Rogers does not dispute that this is his second § 2255 motion challenging his convictions and sentence, but he asks us to remand his § 2255 motion to the district court to be treated as an initial § 2255 motion. In support of his motion for remand, Mr. Rogers asks us to consider whether his motion is successive “[u]nder the pre-AEDPA

standard announced in *McClesky v. Zant*, 499 U.S. 467 (1991).” Mot. at 1. But AEDPA’s amendments to §§ 2244 and 2255 govern the procedures for second or successive claims, and Mr. Rogers offers no explanation or legal authority as to why pre-AEDPA law should govern in his case. We therefore see no basis to remand the motion to the district court.

Because Mr. Rogers was attempting to file a second § 2255 motion challenging his convictions and sentence without the requisite authorization, the district court did not err in treating it as an unauthorized second or successive § 2255 motion. We note, however, that under our more recent precedent the district court should not have automatically transferred the motion to this court. *See In re Cline*, 531 F.3d 1249, 1251-52 (10th Cir. 2008) (per curiam) (explaining that our decision in *Coleman* does not mandate the transfer of all unauthorized second or successive claims). Instead, the district court should have exercised its discretion to determine whether it was in the interests of justice to transfer the motion or whether it was more appropriate to dismiss the motion for lack of jurisdiction. *See id.* at 1252.

For the foregoing reasons, we deny the motion for remand. This matter is terminated.

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", is written over a light blue dotted rectangular background.

ELISABETH A. SHUMAKER, Clerk