

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:

UNDRAY LYNELL PERRY,

Movant.

No. 13-6124
(D.C. Nos. 5:11-CV-01210-F &
5:10-CR-00114-F-1)
(W.D. Okla.)

ORDER

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

Undray Lynell Perry, a federal prisoner appearing pro se, moves for authorization to file a second or successive 28 U.S.C. § 2255 motion. We deny authorization.

Mr. Perry pleaded guilty to possession with intent to distribute cocaine base on April 12, 2010. After the Fair Sentencing Act of 2010 took effect in August 2010, he was sentenced to 150 months' imprisonment and five years' supervised release. He filed a direct criminal appeal, but we granted the government's motion to enforce the appeal waiver contained in his plea agreement and dismissed the appeal. *United States v. Perry*, 432 F. App'x 728, 731 (10th Cir. 2011) (per curiam). Mr. Perry then filed a § 2255 motion in the United States District Court for the Western District of Oklahoma. The district court denied the motion, and this court denied his application for a certificate of appealability. *United States v. Perry*, 495 F. App'x 935, 936 (10th Cir. 2012).

Mr. Perry now seeks authorization from this court to file a second or successive § 2255 motion. In order to file a second or successive § 2255 motion in the district court, Mr. Perry must first obtain our authorization. *See* 28 U.S.C. § 2255(h); *id.* § 2244(b)(3). This court may authorize a claim only if Mr. Perry makes a prima facie showing that the claim 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 [him] 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).

In his application for authorization and proposed § 2255 motion, Mr. Perry relies on the Supreme Court’s recent decision in *Dorsey v. United States*, ___ U.S. ___, 132 S. Ct. 2321 (2012), arguing that it announced a new rule of law. “In *Dorsey*, the Court held that the Fair Sentencing Act’s new, lower mandatory minimums [for crack cocaine offenses] apply to the post-Act sentencing of pre-Act offenders.” *In re Shines*, 696 F.3d 1330, 1331-32 (10th Cir. 2012) (per curiam) (internal quotation marks omitted). “However, *Dorsey* did not announce a new rule of *constitutional* law, as required by § 2255(h)(2). Instead, *Dorsey* concerned statutory interpretation[, and . . . new statutory interpretations cannot be raised in a second or successive § 2255 motion.” *In re Shines*, 696 F.3d at 1332.

Mr. Perry has failed to meet the standard for authorization in 28 U.S.C. § 2255(h). 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 cursive script, reading "Elisabeth A. Shumaker", written in black ink on a white background.

ELISABETH A. SHUMAKER, Clerk