

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

July 27, 2016

**Elisabeth A. Shumaker
Clerk of Court**

In re: GARY WAYNE ADAMS,

Movant.

No. 16-5114
(D.C. Nos. 4:13-CV-00349-CVE-PJC &
4:11-CR-00017-CVE-1)
(N.D. Okla.)

ORDER

Before **LUCERO, HARTZ, and PHILLIPS**, Circuit Judges.

Gary Wayne Adams, 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. For the following reasons, we deny the motion.

Mr. Adams entered a guilty plea to being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). He was sentenced to 180 months in prison under the Armed Career Criminal Act (ACCA) based on three prior convictions for violent felonies. His direct appeal was dismissed as untimely.

Mr. Adams then filed a § 2255 motion. He alleged that his counsel was ineffective for failing to challenge one of the burglary convictions used to enhance his sentence and for failing to file a timely appeal.

The district court denied the claim relating to counsel's failure to challenge the burglary conviction. The court explained that, under the modified categorical approach, it was clear that Mr. Adams broke into a building (as opposed to a ship or vehicle) and

therefore the offense constituted generic burglary that qualified as a “violent felony” predicate offense. *See United States v. Adams*, No. 11-CR-0017-CVE, 2014 WL 1119780, at *4 (N.D. Okla. Mar. 20, 2014). The district court also noted that Mr. Adams had three other prior convictions that would qualify as predicate offenses. *Id.* at *4 n.3.

The court took the other ineffective assistance claim under advisement and set an evidentiary hearing, but ultimately denied that claim after finding that Mr. Adams had not specifically instructed his counsel to file a direct appeal. *See United States v. Adams*, No. 11-CR-0017-CVE, 2014 WL 3449915, at *1, *6 (N.D. Okla. July 11, 2014). Mr. Adams then applied for a certificate of appealability, which this court denied. *See United States v. Adams*, 587 F. App’x 499, 500 (10th Cir. 2014).

Mr. Adams now seeks authorization to again challenge the use of his burglary conviction to enhance his sentence based on the Supreme Court’s recent decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016). We may authorize the filing of a second or successive § 2255 motion if it is based 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).

The *Mathis* decision involved a challenge to an Iowa burglary conviction that was used to enhance the defendant’s sentence under ACCA. 136 S. Ct. at 2250-51. In resolving the case, the Supreme Court explained:

Our precedents make this a straightforward case. For more than 25 years, we have repeatedly made clear that application of ACCA involves, and involves only, comparing elements. Courts must ask whether the crime of conviction is the same as, or narrower than, the relevant generic offense. They may not ask whether the defendant’s conduct—his particular means

of committing the crime—falls within the generic definition. And that rule does not change when a statute happens to list possible alternative means of commission: Whether or not made explicit, they remain what they ever were—just the facts, which ACCA (so we have held, over and over) does not care about.

Id. at 2257. Applying this longstanding precedent to the case before it, the Court concluded: “Because the elements of Iowa’s burglary law are broader than those of generic burglary, [the defendant’s] convictions under that law cannot give rise to an ACCA sentence.” *Id.*

The *Mathis* decision does not involve a new rule of constitutional law but instead involves the use of established precedent to resolve an issue of statutory interpretation—how to determine if a burglary conviction can be used to enhance a sentence under the ACCA. Such a decision cannot satisfy the authorization requirements in § 2255(h). *See In re Shines*, 696 F.3d 1330, 1332 (10th Cir. 2012) (per curiam). Moreover, the Supreme Court has not made *Mathis* retroactive to cases on collateral review.

Because Mr. Adams cannot meet the requirements for authorization in § 2255(h)(2), we deny the 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



ELISABETH A. SHUMAKER, Clerk