

FILED

United States Court of Appeals  
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

March 20, 2017

Elisabeth A. Shumaker  
Clerk of Court

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In re: TIMOTHY JAMES KENNELLEY,

Movant.

No. 17-2016  
(D.C. Nos. 1:16-CV-00153-MCA-GBW &  
1:06-CR-00499-MCA-1)  
(D. N.M.)

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**ORDER**

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

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Timothy James Kennelley moves for authorization to file a second or successive motion under 28 U.S.C. § 2255. We deny authorization.

Mr. Kennelley pleaded guilty in 2007 to being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1). While that offense is normally punishable by ten years' imprisonment, *see id.* § 924(a)(2), the presentence report determined Mr. Kennelley qualified for an enhancement under the Armed Career Criminal Act (ACCA) because he had three prior violent felonies: two burglaries and one domestic violence assault. He was therefore sentenced to fifteen years' imprisonment, the statutory minimum.

About eight years after he withdrew his direct appeal before this court, Mr. Kennelley, then proceeding without the assistance of counsel, moved to vacate, set aside, or correct his sentence under § 2255 on March 3, 2016, arguing his sentence is unlawful under *Johnson v. United States*, 135 S. Ct. 2551 (2015). Five days later, the

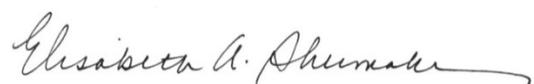
district court dismissed the motion with prejudice. However, in June 2016, the district court appointed counsel for Mr. Kennelley pursuant to a March 25, 2016, administrative order regarding defendants who might have claims under *Johnson*. Newly counseled, Mr. Kennelley moved under Federal Rule of Civil Procedure 60(b) for relief from the judgment on his § 2255 motion, arguing such relief would give effect to the court's appointment of counsel. The district court concluded this motion was an unauthorized second or successive § 2255 motion and transferred the matter to this court. Counsel then filed the motion for authorization.

To obtain authorization under the Antiterrorism and Effective Death Penalty Act (AEDPA), Mr. Kennelley's proposed § 2255 motion must rely 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 [challenged] 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). Mr. Kennelley must make a prima facie showing that he can satisfy one of these gate-keeping requirements. *See In re Shines*, 696 F.3d 1330, 1332 (10th Cir. 2012) (per curiam); *see also* 28 U.S.C. § 2244(b)(3)(C).

Though Mr. Kennelley clearly articulates his basis for relief under *Johnson*, he cannot obtain authorization to file a second or successive § 2255 motion because, having urged these same arguments in his initial § 2255 motion, he is unable to demonstrate that any new rule of constitutional law "was previously unavailable." 28 U.S.C. § 2255(h)(2).

The motion for authorization is denied. 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.” *Id.* § 2244(b)(3)(E).

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", with a long horizontal flourish extending to the right.

ELISABETH A. SHUMAKER, Clerk