FILED
United States Court of Appeals
Tenth Circuit

February 14, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: JAMES NATHAN KELLUM, Movant.	No. 18-5004 (D.C. Nos. 4:05-CV-00357-JHP-FHM, 4:01-CV-00041-seh, 4:99-CR-00091-JHP-2) (N.D. Okla.)

ORDER

Before **BACHARACH**, **PHILLIPS**, and **MORITZ**, Circuit Judges.

James Nathan Kellum pleaded guilty to carjacking, armed robbery, and using a firearm in furtherance of a crime of violence. He was sentenced to 332 months in prison, followed by 60 months of supervised release. Mr. Kellum did not file a direct appeal, but did move to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. The district court denied his § 2255 motion. He now seeks authorization to file a second or successive § 2255 motion. We deny authorization.

We may authorize only those claims that 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 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); *see also id.* § 2244(b)(3)(C). Neither of Mr. Kellum's proposed claims meets these requirements.

Mr. Kellum first seeks to bring a claim that the district court's "double counting" violated the Fifth Amendment's prohibition on double jeopardy. He alleges that the six-level increase he received under U.S. Sentencing Guidelines Manual § 2B3.1(b)(2)(B) (U.S. Sentencing Comm'n) and the seven-year sentence he received under 18 U.S.C. § 924(c) constituted multiple punishments for the same offense. He states that this claim would have been available on direct appeal but for the ineffective assistance of his counsel, so it would be a fundamental miscarriage of justice not to allow him to bring it now. This claim does not rely on newly discovered evidence or a new rule of constitutional law.

Mr. Kellum also seeks to bring a claim based on this court's recent decision in *United States v. O'Connor*, 874 F.3d 1147, 1158 (10th Cir. 2017). In *O'Connor*, we held that a prior conviction for Hobbs Act robbery under 18 U.S.C. § 1951(b)(1) is not a "crime of violence" under § 4B1.2 of the Sentencing Guidelines. 874 F.3d at 1158. Mr. Kellum seems to be arguing that the reasoning in *O'Connor* should be extended to invalidate his § 924(c) conviction. But *O'Connor* does not pronounce "a new rule of constitutional law, *made retroactive to cases on collateral review by the Supreme Court*, that was previously unavailable," as required by § 2255(h)(2) (emphasis added).

Because Mr. Kellum has failed to meet the requirements for authorization, 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

ELISABETH A. SHUMAKER, Clerk