FILED
United States Court of Appeals
Tenth Circuit

October 22, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JACK DOWELL,

Petitioner - Appellant,

v.

RICHARD HUDGINS, Warden, FCI Englewood,

Respondent - Appellee.

No. 19-1118
(D.C. No. 1:19-CV-00275-LTB)
(D. Colorado)

ORDER AND JUDGMENT*

Before **BRISCOE**, **McHUGH**, and **MORITZ**, Circuit Judges.

Jack Dowell, a prisoner in federal custody proceeding pro se,[1] appeals the district court's denial of his application for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. We affirm the district court.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

[1] Because Mr. Dowell is proceeding pro se, "we liberally construe his filings, but we will not act as his advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

Appendix 4

I. BACKGROUND

In 2001, following a jury trial, Mr. Dowell was convicted of destroying government property by fire in violation of 18 U.S.C. §§ 2, 844(f)(1) & 2 ("Count One"), and forcibly interfering with Internal Revenue Service employees and administration in violation of 18 U.S.C. § 2 and 26 U.S.C. § 7212(a) ("Count Two"). *United States v. Dowell*, 430 F.3d 1100, 1105 (10th Cir. 2005). The district court sentenced him to 360 months' imprisonment, and we affirmed his conviction and sentence on direct appeal. *See id.*

In 2007, Mr. Dowell filed his first motion for post-conviction relief under 28 U.S.C. § 2255, asking the district court to vacate his sentence and raising over a dozen claims of ineffective assistance of counsel. *United States v. Dowell*, 388 F.App'x 781, 782–83 (10th Cir. 2010) (unpublished). After appointing counsel for Mr. Dowell and holding an evidentiary hearing, the district court denied the § 2255 motion and denied a COA; we likewise denied a COA. *Id.* at 785. Since then, Mr. Dowell has made several other attempts at post-conviction relief. *See United States v. Dowell*, 604 F. App'x 702, 703 (10th Cir. 2015) (unpublished) (recounting post-conviction proceedings).

Relevant to the present case, in 2018, Mr. Dowell sought our authorization to file a second or successive 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence, arguing his conviction on Count Two was invalid in light of the

Supreme Court's decision in *Marinello v. United States*, 138 S. Ct. 1101 (2018).[2] We denied his motion, reasoning that *Marinello* did not announce a new rule of constitutional law retroactively applicable to cases on collateral review. Following our denial, Mr. Dowell applied to the district court for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. The magistrate judge ordered Mr. Dowell to show cause why his habeas application should not be dismissed on the grounds that 28 U.S.C. § 2255 afforded him an adequate and effective remedy. Mr. Dowell filed a response, arguing § 2255 afforded him an inadequate remedy because (1) the Tenth Circuit had denied him permission to pursue his *Marinello* claim in a second or successive § 2255 motion, and (2) his claim was not reasonably available until the Supreme Court decided *Marinello*. The district court rejected both arguments and dismissed Mr. Dowell's application for a writ of habeas corpus for lack of jurisdiction. Mr. Dowell timely appealed.

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[2] In *Marinello*, the Supreme Court interpreted the second clause of 26 U.S.C. § 7212(a), an Internal Revenue Code provision making it a felony to "corruptly or by force . . . endeavor[] to obstruct or impede, the due administration of [the Tax Code]." 138 S. Ct. 1101, 1104 (2018) (quoting 26 U.S.C. § 7212(a)). The Court held that "'the due administration of [the Tax Code]' does not cover routine administrative procedures that are near-universally applied to all taxpayers, such as the ordinary processing of income tax returns." *Id.* (quoting 26 U.S.C. § 7212(a)). Instead, conviction under this provision requires proof of "specific interference with targeted governmental tax-related proceedings, such as a particular investigation or audit." *Id.*

II. DISCUSSION

A. *Standard of Review*

"When reviewing the denial of a habeas petition under § 2241, we review the district court's legal conclusions de novo and accept its factual findings unless clearly erroneous." *Leatherwood v. Allbaugh*, 861 F.3d 1034, 1042 (10th Cir. 2017) (quotation marks omitted). We review "[a] district court's decision to grant or deny an evidentiary hearing in a habeas proceeding . . . for an abuse of discretion." *Anderson v. Att'y Gen. of Kansas*, 425 F.3d 853, 858 (10th Cir. 2005).

B. *Discussion*

"[Section] 2241 petitions . . . are generally reserved for complaints about the *nature* of a prisoner's confinement, not the *fact* of his confinement." *Prost v. Anderson*, 636 F.3d 578, 581 (10th Cir. 2011). However, 28 U.S.C. § 2255(e) includes a "savings clause" which sometimes allows a prisoner to challenge the legality of his detention, not simply the conditions of his confinement, under § 2241. 28 U.S.C. § 2255(e). "To fall within the ambit of [the] savings clause and so proceed to § 2241, a prisoner must show that 'the remedy by motion under § 2255 is inadequate or ineffective to test the legality of his detention.'" *Prost*, 636 F.3d at 581 (quoting 28 U.S.C. § 2255(e)) (alteration omitted). In sum, "[t]he exclusive remedy for testing the validity of a judgment and sentence, unless it is inadequate or ineffective, is that provided for in 28 U.S.C. § 2255." *Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir. 1996) (quotation marks omitted). Moreover, "the mere fact [that a prisoner] is precluded from filing a second § 2255 petition does not establish that the

remedy in § 2255 is inadequate." *Caravalho v. Pugh*, 177 F.3d 1177, 1179 (10th Cir. 1999). Rather, "[t]he relevant metric or measure" in determining whether § 2255 affords an adequate remedy "is whether a petitioner's argument challenging the legality of his detention could have been tested in an initial § 2255 motion." *Prost*, 636 F.3d at 584.

Because Mr. Dowell's challenge goes to the validity of his conviction and sentence, he bears the burden of demonstrating that the remedy available under § 2255 is inadequate or ineffective—that is, whether his challenge could have been raised in an initial § 2255 motion. *See Prost*, 636 F.3d at 584.

But Mr. Dowell's primary argument on appeal does not squarely address this question. Rather, he argues he is "being deprived of liberty without due process of law because," in *Prost* and its progeny, this court has "issued rulings that suspended the writ of habeas corpus." Aplt. Br. at 5. Accordingly, he devotes much of his briefing to arguing that *Prost* was wrongly decided.

To be sure, as Mr. Dowell observes, the circuit courts are split on whether § 2255(e)'s "saving clause permits a prisoner to challenge his detention when a change in statutory interpretation raises the potential that he was convicted of conduct that the law does not make criminal." *Bruce v. Warden Lewisburg USP*, 868 F.3d 170, 179 (3d Cir. 2017). Along with the Eleventh Circuit, we have held that an intervening change in statutory interpretation is insufficient to render § 2255's remedy inadequate or ineffective. *Prost*, 636 F.3d at 588; *see also McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1099–1100 (11th Cir. 2017).

Several other circuits have adopted a contrary position, "though based on widely divergent rationales." *Bruce*, 868 F.3d at 179–80 (collecting cases). Mr. Dowell asserts the district court "failed to address all the reasons set forth in [those] cases that the [§ 2255] remedy is both inadequate [and] ineffective to test the legality of [his] detention." Aplt. Br. at 8. But because our decision in *Prost* bound the district court—and, for that matter, binds us—other circuits' arguments for a contrary position are unavailing. *See United States v. Bettcher*, 911 F.3d 1040, 1046 (10th Cir. 2018) ("Absent en banc reconsideration, earlier panels' decisions bind us unless the Supreme Court issues an intervening decision that is contrary to or invalidates our previous analysis." (internal quotation marks omitted)).

Mr. Dowell also argues that *Marinello* announced a new rule of constitutional law that applies retroactively to his case. In light of *Marinello*'s holding that a conviction under the second clause of 26 U.S.C. § 7212(a) requires a finding of "specific interference with targeted governmental tax-related proceedings" such as an audit, he argues the jury instruction for Count Two in his case unconstitutionally "relieved the prosecution of its burden of proof . . . and deprived Mr. Dowell of due process of law."[3] Aplt. Br. at 21. Even assuming the merits of this argument, it has no

[3] Although we need not reach the issue here, we note that Mr. Dowell was apparently convicted for violating the *first* clause of 26 U.S.C. § 7212(a), on whose interpretation *Marinello* has no bearing. *See* 26 U.S.C. § 7212(a) (making it a felony to "corruptly or by force or threats of force . . . endeavor[] to intimidate or impede any officer or employee of the United States acting in an official capacity under [the Tax Code]"); *United States v. Dowell*, 430 F.3d 1100, 1105 (10th Cir. 2005) (noting the jury convicted Mr. Dowell of "forcibly interfering with IRS employees and administration, violating . . . 26 U.S.C. § 7212(a)").

bearing on the question before us of whether the district court properly dismissed Mr. Dowell's § 2241 petition. Indeed, if *Marinello* did establish "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," and was applicable to Mr. Dowell's case, then the appropriate path would be to seek our authorization for a second or successive § 2255 motion.[4] 28 U.S.C. § 2255(h). On the other hand, if *Marinello* merely announced a new statutory interpretation, then Mr. Dowell's argument runs up against our holding in *Prost* that an intervening change in statutory interpretation does not render § 2255's remedy inadequate or insufficient. *See Prost*, 636 F.3d at 580 ("The fact that § 2255 bars [a petitioner] from bringing his statutory interpretation argument *now*, in a *second* § 2255 motion . . . doesn't mean the § 2255 remedial process was ineffective or inadequate to test his argument. It just means he waited too long to raise it.").

Finally, Mr. Dowell argues the district court should have held "an evidentiary hearing to afford him an opportunity to prove that he is actually innocent of Count Two." Aplt. Br. at 4. But the district court properly denied an evidentiary hearing because Mr. Dowell's § 2241 motion was improper. "Under the *Prost* framework, a showing of actual innocence is irrelevant." *Abernathy v. Wandes*, 713 F.3d 538, 546 n.7 (10th Cir. 2013). "Accordingly, in resolving Mr. [Dowell's] appeal . . . we have

[4] As noted above, we have already denied Mr. Dowell authorization for a second or successive petition based on his *Marinello* claim because we determined the claim did not satisfy the requirements of 28 U.S.C. § 2255(h).

no need to delve into whether [he] has made a threshold showing of actual innocence." *Id.* Because § 2241 was not a proper vehicle for Mr. Dowell's *Marinello* claim, there was no need for the district court to hold an evidentiary hearing "on the merits of his claim contesting the validity of his conviction." Aplt. Br. at 24.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-00275-GPG

JACK DOWELL,

Applicant,

v.

RICHARD HUDGINS, Warden, FCI Englewood,

Respondent.

ORDER OF DISMISSAL

Applicant, Jack Dowell, is a prisoner in the custody of the Federal Bureau of Prisons at the Federal Correctional Institution at Englewood, Colorado. Mr. Dowell has filed *pro se* an Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (ECF No. 1) and a supporting brief (ECF No. 3). On February 7, 2019, Magistrate Judge Gordon P. Gallagher ordered Mr. Dowell to show cause why this action should not be dismissed because he has an adequate and effective remedy available to him in the sentencing court pursuant to 28 U.S.C. § 2255. On March 11, 2019, Mr. Dowell filed a response to the show cause order captioned "Motion to Show Cause in Compliance With Court Order for Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. §§2241 and 2255(e) and Memorandum Brief in Support of Petition" (ECF No. 7).

The Court must construe the application and other papers filed by Mr. Dowell liberally because he is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However,

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the Court should not be an advocate for a *pro se* litigant. *See Hall*, 935 F.2d at 1110. For the reasons stated below, the Court will dismiss the action for lack of statutory jurisdiction.

Mr. Dowell was convicted in District of Colorado case number 01-cr-00395-RPM-3 of destroying government property by fire and forcibly interfering with Internal Revenue Service employees and administration. He was sentenced to 360 months in prison. The judgment of conviction and the sentence were affirmed on direct appeal. *See United States v. Dowell*, 430 F.3d 1100 (10th Cir. 2005). Mr. Dowell concedes that he has sought and been denied relief in postconviction proceedings in his criminal case. *See United States v. Dowell*, 604 F. App'x 702 (10th Cir. 2015) (recounting extensive postconviction proceedings).

Mr. Dowell asserts one claim in the application contending he is actually innocent of count two in light of *Marinello v. United States*, 138 S. Ct. 1101 (2018). More specifically, Mr. Dowell asserts "[t]he Government failed to prove that Petitioner was aware of a pending tax-related proceeding, such as a particular investigation or audit, or could reasonably foresee that such a proceeding would commence." (ECF No. 3 at 4; ECF No. 7 at 2.)

The purposes of an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 and a motion pursuant to 28 U.S.C. § 2255 are distinct and well established. "A petition under 28 U.S.C. § 2241 attacks the execution of a sentence rather than its validity" and "[a] 28 U.S.C. § 2255 petition attacks the legality of detention." *Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir. 1996). A habeas corpus petition pursuant to §

2241 "is not an additional, alternative, or supplemental remedy, to the relief afforded by motion in the sentencing court under § 2255." *Williams v. United States*, 323 F.2d 672, 673 (10th Cir. 1963) (per curiam). Instead, "[t]he exclusive remedy for testing the validity of a judgment and sentence, unless it is inadequate or ineffective, is that provided for in 28 U.S.C. § 2255." *Johnson v. Taylor*, 347 F.2d 365, 366 (10th Cir. 1965); *see* 28 U.S.C. § 2255(e).

It is clear to the Court, and Mr. Dowell does not dispute, that he is challenging the validity of his conviction and sentence in this habeas corpus action. Therefore, his claim must be raised in a motion pursuant to § 2255 unless that remedy is inadequate or ineffective.

Mr. Dowell bears the burden of demonstrating that the remedy available pursuant to § 2255 is inadequate or ineffective. *See Prost v. Anderson*, 636 F.3d 578, 584 (10th Cir. 2011). This burden is not easily satisfied because "[o]nly in rare instances will § 2255 fail as an adequate or effective remedy to challenge a conviction or the sentence imposed." *Sines v. Wilner*, 609 F.3d 1070, 1073 (10th Cir. 2010); *see also Caravalho v. Pugh*, 177 F.3d 1177, 1178 (10th Cir. 1999) (noting that the remedy available pursuant to § 2255 is inadequate or ineffective only in "extremely limited circumstances"). The test for determining whether the remedy provided in the sentencing court pursuant to § 2255 is inadequate or ineffective is whether Mr. Dowell's claim could have been raised in an initial § 2255 motion. *See Prost*, 636 F.3d at 584. "If the answer is yes, then the petitioner may not resort to the savings clause [in § 2255(e)] and § 2241." *Id.*

Mr. Dowell first contends the remedy available in the sentencing court pursuant

to § 2255 is inadequate and ineffective because the United States Court of Appeals for the Tenth Circuit has denied him permission to pursue his *Marinello* claim in a second or successive § 2255 motion. He also argues that § 2255 provides an inadequate and ineffective remedy because his claim was not reasonably available until the Supreme Court decided *Marinello* and that decision demonstrates he is actually innocent and is retroactively applicable to cases on collateral review. The Court is not persuaded.

"[T]he mere fact that [a prisoner] is precluded from filing a second § 2255 petition does not establish that the remedy in § 2255 is inadequate." *Caravalho*, 177 F.3d at 1179. Furthermore, under *Prost*, the savings clause in § 2255(e) does not extend to second or successive claims that fail to meet the requirements of § 2255(h). *See Prost*, 636 F.3d at 585-86. Finally, "[u]nder the *Prost* framework, a showing of actual innocence is irrelevant." *Abernathy v. Wandes*, 713 F.3d 538, 546 n.7 (10th Cir. 2013).

For these reasons, the Court finds that Mr. Dowell fails to demonstrate the remedy available in the sentencing court pursuant to § 2255 is inadequate or ineffective and the application must be dismissed for lack of statutory jurisdiction. *See Abernathy*, 713 F.3d at 557. The Court also certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith and therefore *in forma pauperis* status will be denied for the purpose of appeal. *See Coppedge v. United States*, 369 U.S. 438 (1962). If Applicant files a notice of appeal he also must pay the full $505 appellate filing fee or file a motion to proceed *in forma pauperis* in the United States Court of Appeals for the Tenth Circuit within thirty days in accordance with Fed. R. App. P. 24. Accordingly, it is

ORDERED that the action is dismissed for lack of statutory jurisdiction. It is FURTHER ORDERED that leave to proceed *in forma pauperis* on appeal is denied without prejudice to the filing of a motion seeking leave to proceed *in forma pauperis* on appeal in the United States Court of Appeals for the Tenth Circuit.

DATED at Denver, Colorado, this 15th day of March, 2019.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-00275-LTB

JACK DOWELL,

Applicant,

v.

RICHARD HUDGINS, Warden, FCI Englewood,

Respondent.

JUDGMENT

Pursuant to and in accordance with the Order of Dismissal entered by Lewis T. Babcock, Senior District Judge, on March 15, 2019, it is hereby

ORDERED that Judgment is entered in favor of Respondent and against Applicant.

DATED at Denver, Colorado, this 15 day of March, 2019.

FOR THE COURT,

JEFFREY P. COLWELL, Clerk

By: s/ A. Garcia Garcia
Deputy Clerk

FILED
United States Court of Appeals
Tenth Circuit

November 13, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JACK DOWELL,

Petitioner - Appellant,

v.

RICHARD HUDGINS, Warden, FCI Englewood,

Respondent - Appellee.

No. 19-1118

ORDER

Before **BRISCOE**, **McHUGH**, and **MORITZ**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

Appendix 5

FILED
United States Court of Appeals
Tenth Circuit

December 7, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: JACK DOWELL, Movant.	No. 18-1451 (D.C. Nos. 1:07-CV-02002-RPM & 1:01-CR-00395-RPM-3) (D. Colo.)

ORDER

Before **HOLMES**, **MATHESON**, and **PHILLIPS**, Circuit Judges.

Jack Dowell, 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. Because he has not met the requisite conditions for authorization under § 2255(h), we deny authorization.

I. Background

Dowell was convicted after a jury trial of destroying government property by fire, in violation of 18 U.S.C. §§ 2, 844(f)(1) & (2), and forcibly interfering with Internal Revenue Service (IRS) employees and administration, in violation of § 2 and 26 U.S.C. § 7212(a). *United States v. Dowell*, 430 F.3d 1100, 1105 (10th Cir. 2005). He and other members of a so-called "constitutional law group" devised a plan to set fire to an IRS office. They broke in, poured gasoline throughout the office, and ignited it. *Id.* Dowell was sentenced to 360 months' imprisonment. *Id.*

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We affirmed Dowell's convictions and sentence on direct appeal. *Id.* at 1113. The district court denied his first § 2255 motion, and we denied a certificate of appealability. *United States v. Dowell*, 388 F. App'x 781, 782 (10th Cir. 2010). Dowell has subsequently filed several motions in the district court raising additional challenges to his convictions, none of which were successful in obtaining relief. This court has also previously denied him authorization to file a second or successive § 2255 motion.

II. Discussion

To obtain our authorization, Dowell must make a prima facie showing that he can satisfy one of the gate-keeping requirements in 28 U.S.C. § 2255(h). *See In re Shines*, 696 F.3d 1330, 1332 (10th Cir. 2012) (per curiam); *see also* 28 U.S.C. § 2244(b)(3)(C). Dowell seeks to bring a successive § 2255 motion contending that his conviction under 26 U.S.C. § 7212(a) is invalid based on the Supreme Court's recent decision in *Marinello v. United States*, 138 S. Ct. 1101 (2018). He contends that his motion satisfies § 2255(h)(2) because *Marinello* announced "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."[1]

Section 7212(a) provides:

> (a) Corrupt or forcible interference.--Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United

[1] Dowell also argues that *Marinello* is "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," 28 U.S.C. § 2255(h)(1). But a Supreme Court decision is not "evidence." He therefore has not made a prima facie showing that he can satisfy § 2255(h)(1).

> States acting in an official capacity under this title, or in any other way **corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of [the Internal Revenue Code]**, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. The term "threats of force", as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

26 U.S.C. § 7212(a) (emphasis added). In *Marinello*, the Court construed the scope of the above-highlighted language of § 7212(a), which it referred to as the "Omnibus Clause." 138 S. Ct. at 1105. *Marinello* concluded that

> to secure a conviction under the Omnibus Clause, the Government must show (among other things) that there is a "nexus" between the defendant's conduct and a particular administrative proceeding, such as an investigation, an audit, or other targeted administrative action. That nexus requires a relationship in time, causation, or logic with the administrative proceeding. By "particular administrative proceeding" we do not mean every act carried out by IRS employees in the course of their continuous, ubiquitous, and universally known administration of the Tax Code. While we need not here exhaustively itemize the types of administrative conduct that fall within the scope of the statute, that conduct does not include routine, day-to-day work carried out in the ordinary course by the IRS, such as the review of tax returns.

Id. at 1109-10 (citations, brackets, and internal quotation marks omitted). The Court further held that, "[i]n addition to satisfying this nexus requirement, the Government must show that the proceeding was pending at the time the defendant engaged in the obstructive conduct or, at the least, was then reasonably foreseeable by the defendant." *Id.* at 1110.

Dowell argues that he is innocent of an offense under the Omnibus Clause of § 7212(a) because the government failed to present evidence of a nexus, as required

under *Marinello*, between his conduct in setting fire to the IRS office and a particular administrative proceeding. To file a second or successive § 2255 motion, however, Dowell must show both the existence of a "new rule of constitutional law" and that the new rule has been "made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2255(h)(2). We need not resolve in this proceeding whether *Marinello* announced a new rule of constitutional law because, even assuming it did, Dowell has not shown that any such new constitutional rule has been made retroactive to cases on collateral review by the Supreme Court.

"Under § 2255(h)(2), the Supreme Court is the only entity that can 'make' a new rule retroactive. And the Supreme Court can only make a rule retroactively applicable through a holding to that effect." *In re Gieswein*, 802 F.3d 1143, 1146 (10th Cir. 2015) (per curiam) (citations, ellipsis, and internal quotation marks omitted). The Supreme Court has not explicitly held that *Marinello* is retroactively applicable to cases on collateral review. Dowell contends, however, that *Marinello* announced the *type of rule* that is applied retroactively under the Supreme Court's *Teague* doctrine[2]—as that doctrine was applied in *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004), and *Bousley v. United States*, 523 U.S. 614, 620-21 (1998)—because *Marinello* narrowed the scope of a criminal statute by interpreting its terms. But Dowell must do more than argue that a rule *should be* applied retroactively under Supreme Court precedent. "It is clear that the mere fact a new rule *might* fall within the general parameters of overarching retroactivity

[2] *Teague v. Lane*, 489 U.S. 288 (1989).

principles established by the Supreme Court (i.e., *Teague*) is not sufficient." *Cannon v. Mullin*, 297 F.3d 989, 993 (10th Cir. 2002). This is so because "[t]he [Supreme] Court does not make a rule retroactive when it merely establishes principles of retroactivity and leaves the application of those principles to lower courts." *Id.* (internal quotation marks omitted).

> Thus, in the context of deciding a motion for authorization, it is not this court's task to determine whether (or not) a new rule fits within one of the categories of rules that the Supreme Court has held apply retroactively. Our inquiry is statutorily limited to whether the Supreme Court *has made* the new rule retroactive to cases on collateral review.

Gieswein, 802 F.3d at 1146 (citation omitted).

Dowell also argues that, under Justice O'Connor's reasoning in *Tyler v. Cain*, 533 U.S. 656, 668-69 (2001) (O'Connor, J., concurring), the Supreme Court *has made* the rule in *Marinello* retroactive. In *Tyler*, the Court recognized that "[m]ultiple cases can render a new rule retroactive"—"with the right combination of holdings"—but "only if the holdings in those cases necessarily dictate retroactivity of the new rule." *Id.* at 666. Justice O'Connor then posited in her *Tyler* concurrence that

> if [the Court] hold[s] in Case One that a particular type of rule applies retroactively to cases on collateral review and hold[s] in Case Two that a given rule is of that particular type, then it necessarily follows that the given rule applies retroactively to cases on collateral review. In such circumstances, we can be said to have "made" the given rule retroactive to cases on collateral review.

Id. at 668-69. Dowell contends that *Marinello* fits neatly within Justice O'Connor's example, but he does not identify an applicable "Case Two"—a Supreme Court decision holding that the rule announced in *Marinello* "is of a particular type that the Court

previously held applies retroactively," *Gieswein*, 802 F.3d at 1147. "And the Supreme Court—not this court—must make that determination." *Id.*

III. Conclusion

Because Dowell has not made a prima facie showing that he can satisfy one of the gate-keeping requirements in 28 U.S.C. § 2255(h), we deny his motion for authorization to file a second or successive § 2255 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

ELISABETH A. SHUMAKER, Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK

Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

Elisabeth A. Shumaker
Clerk of Court

Chris Wolpert
Chief Deputy Clerk

December 07, 2018

Mr. Jack Dowell
FCI - Englewood
9595 West Quincy Avenue
Littleton, CO 80123
#05225-017

RE: 18-1451, In re: Dowell
Dist/Ag docket: 1:07-CV-02002-RPM, 1:01-CR-00395-RPM-3

Dear Mr. Dowell:

Enclosed please find an order issued today by the court.

Please contact this office if you have questions.

Sincerely,

Elisabeth A. Shumaker

Elisabeth A. Shumaker
Clerk of the Court

cc: Martha A. Paluch

EAS/lab