

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re:

RICKKE LEON GREEN,

Movant.

No. 07-6204
(D.C. Nos. 82-CR-62-W &
07-CV-924-W)

ORDER
Filed December 5, 2007

Before **BRISCOE**, **LUCERO**, and **HOLMES**, Circuit Judges.

Rickke Leon Green has filed a motion for authorization to file a second or successive motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 or to remand to the district court. Although we deny authorization to file a second or successive § 2255 motion, we remand to the district court those claims that do not fall within the parameters of § 2255.

In 1982, Mr. Green was convicted of assault with a dangerous weapon with intent to do bodily harm and without just cause or excuse and was sentenced to five years' imprisonment, to be served consecutively to any sentence imposed previously. He did not appeal. On July 19, 1985, he filed a § 2255 motion asserting that he was denied his right to appeal due to ineffective assistance of trial counsel. The district court denied § 2255 relief. On appeal, this court

reversed and remanded for an evidentiary hearing to determine if Mr. Green notified his trial counsel that he wished to appeal. After holding the hearing, during which Mr. Green presented no evidence, the magistrate judge found that Mr. Green's appeal rights were explained to him at the time of sentencing, that Mr. Green told his counsel he did not wish to appeal, that Mr. Green did not ask counsel to file a notice of appeal, and that counsel did not know Mr. Green wanted to appeal. In addition, the magistrate judge found that Mr. Green made no showing to excuse a deliberate bypass of the appeal process and that Mr. Green's counsel was not ineffective. The district court agreed with these findings and denied § 2255 relief. This court affirmed on November 22, 1988. On July 18, 1996, Mr. Green was released from federal custody.

On August 16, 2007, Mr. Green filed in federal district court another § 2255 motion, apparently prompted by an Oklahoma court's use of his federal conviction to enhance a state sentence. The district court transferred the proposed § 2255 motion to this court because Mr. Green had not obtained our authorization to file a second or successive § 2255 motion. *See Coleman v. United States*, 106 F.3d 339, 341 (10th Cir. 1997) (per curiam) (directing district courts to transfer unauthorized second or successive § 2255 motions to Tenth Circuit in interest of justice pursuant to 28 U.S.C. § 1631).

Mr. Green has filed in this court a Motion for Appointment of Counsel (in View of Petitioner's Circumstances) or in the Alternative Motion for

Authorization and Motion for Remand on the Basis of the Pleadings. He asserts that failure to allow him to challenge his federal conviction would (1) violate the collateral consequences doctrine since the federal conviction was used to enhance a state conviction; (2) preclude him from relief from a void conviction; (3) prohibit him from asserting constitutional violations occurring after his first § 2255 motion; (4) prohibit him from showing that his appointed counsel, the federal government, and the federal district court colluded to defeat his prior § 2255 motion by obstructing the evidence, thereby causing the first § 2255 decision to be fundamentally unfair; (5) prevent him from showing his innocence; (6) prevent him from showing judicial bias; and (7) allow the Oklahoma and federal governments to apply constitutional law arbitrarily and capriciously. In addition, he argues that (8) applying the Antiterrorism and Effective Death Penalty Act (AEDPA) to a twenty-five year old conviction violates ex post facto principles; (9) the AEDPA constitutes a bill of attainder; (10) the AEDPA is unconstitutionally broad and vague; and (11) the AEDPA authorizes arbitrary violations of due process and equal protection. Lastly, Mr. Green asserts the following claims in his proposed § 2255 motion: (a) because he notified the district court of his intent to appeal, that court unconstitutionally denied him his right to appeal; (b) his trial counsel was constitutionally ineffective, because counsel failed to file a notice of appeal; (c) the district court denied his right to appeal despite knowing he intended to appeal; (d) the district court conspired with

counsel and the government to obstruct his right to appeal and the district court did not act impartially; (e) the government lost jurisdiction over his federal conviction because he was not allowed to serve that sentence in the sequence ordered; (f) after he succeeded in obtaining release in state post-conviction proceedings, the government reasserted jurisdiction and penalized him for exercising his constitutional rights; (g) his federal sentence has become indefinite and uncertain; (h) the manner in which he is serving his federal sentence is unconstitutional, because the Federal Bureau of Prisons and the Oklahoma Department of Corrections have assumed judicial sentencing powers and have re-written their statutory duties; (i) the federal government, by not requiring him to serve his federal sentence as ordered, caused the State of Oklahoma to unlawfully use his federal conviction to enhance his state sentence; (j) the federal government's improper computation of his discharge date caused the State of Oklahoma to unlawfully use his conviction to enhance his state sentence; (k) the improper computation of his discharge caused the Oklahoma Department of Corrections to adversely classify him to medium rather than to minimum security; and (l) the federal government improperly extended his federal sentence for a longer period of time than the law allows.

We conclude the district court correctly treated claims (a) through (d) of Mr. Green's proposed § 2255 motion as a second or successive motion. To the extent the proposed motion challenges the same federal criminal conviction

challenged in his first § 2255 motion, it is a second or successive motion, and he must receive authorization from this court before filing it in the federal district court. *Cf. Burton v. Stewart*, 127 S. Ct. 793, 796 (2007) (per curiam) (discussing second or successive habeas petitions and need for authorization under 28 U.S.C. § 2244(b)(3)). Although Mr. Green seeks authorization to file a second or successive § 2255 motion, he has not set forth either the requisite new, retroactively applicable rule of constitutional law or new facts showing his actual innocence. *See* 28 U.S.C. § 2255 para. 8. Contrary to Mr. Green's arguments, the AEDPA's procedural authorization requirements under § 2244 apply to all second or successive § 2255 motions filed after AEDPA's enactment. *See Daniels v. United States*, 254 F.3d 1180, 1188-89 (10th Cir. 2001) (en banc).

But all of Mr. Green's claims cannot properly be characterized as challenging his federal conviction. To the extent he challenges the validity of his state sentence, those claims must be brought in a petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. *See Montez v. McKinna*, 208 F.3d 862, 865 (10th Cir. 2000). To the extent he attacks the execution of his federal and state sentences, those claims must be brought in a petition filed under 28 U.S.C. § 2241. *See Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir. 1996). We remand claims (e) through (l) to the district court for further proceedings, as those claims would be properly brought under § 2254 or § 2241. We leave the characterization of these claims to the district court in the first instance.

Mr. Green additionally argues that prison officials are obstructing his access to the Tenth Circuit and therefore we should appoint counsel to represent him. Further, he requests an emergency court order to stop the alleged obstruction and harassment. As we informed Mr. Green in orders filed October 2, 2007, and October 17, 2007, he must pursue any claims against prison officials regarding alleged interference with access to the courts in a new case filed in district court, as those claims cannot be adjudicated in this case.

Accordingly, Mr. Green's motions for appointment of counsel and for an emergency court order are DENIED. His request for authorization to file a second or successive § 2255 motion as to claims (a) through (d) is DENIED. The denial of authorization is not appealable and may not be the subject of a petition for rehearing or for a writ of certiorari. *See* 28 U.S.C. § 2244(b)(3)(E). Mr. Green's motion to remand is GRANTED as to claims (e) through (l).

Entered for the Court



ELISABETH A. SHUMAKER, Clerk