FILED
United States Court of Appeals
Tenth Circuit

August 6, 2008

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: GERALD G. COTTON, Movant.	No. 08-2170

ORDER

Before **LUCERO**, **EBEL**, and **McCONNELL**, Circuit Judges.

Gerald G. Cotton has filed a motion seeking authorization to file a second or successive motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. He contends that, when sentencing him, the district court failed to adjust his sentence under sentencing guideline § 5G1.3(b) for time he spent in state custody for relevant conduct before his federal sentence began.

A movant seeking to bring a second or successive § 2255 motion may proceed only with a claim that relies 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

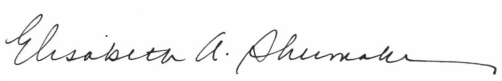
previously unavailable." 28 U.S.C. § 2255(h). Mr. Cotton proceeds under the new evidence standard of § 2255(h)(1), but because he challenges his sentence rather than his guilt of the underlying offense, his motion fails to satisfy the statute.[1] *See In re Dean*, 341 F.3d 1247, 1248 (11th Cir. 2003) ("Section 2255's newly discovered evidence exception . . . does not apply to claims asserting sentencing error."); *In re Vial*, 115 F.3d 1192, 1198 (4th Cir. 1997) (en banc) (holding that the new evidence provision "applies only to challenges to the underlying conviction; it is not available to assert sentencing error"); *Hope v. United States*, 108 F.3d 119, 120 (7th Cir. 1997) ("We conclude that a successive motion under 28 U.S.C. § 2255 . . . may not be filed on the basis of newly discovered evidence unless the motion challenges the conviction and not merely the sentence.").

Mr. Cotton's motion for authorization to file a second or successive § 2255 motion is DENIED. This denial of authorization is not appealable and "shall not

[1] Mr. Cotton was sentenced to a term of imprisonment, not to death. This court has stated that "[a] person cannot be actually innocent of a noncapital sentence." *Reid v. Oklahoma*, 101 F.3d 628, 630 (10th Cir. 1996) (quotation omitted; alteration in original). We do not address whether a federal prisoner sentenced to the death penalty may bring a second or successive § 2255 motion asserting that he is actually innocent of the death penalty. *See LaFevers v. Gibson*, 238 F.3d 1263, 1267 (10th Cir. 2001) (declining to decide the issue in the context of a second or successive 28 U.S.C. § 2254 motion).

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