

UNITED STATES COURT OF APPEALS February 25, 2008
FOR THE TENTH CIRCUIT Elisabeth A. Shumaker
Clerk of Court

In re:

JOSEPH A. ELLSWORTH,
Movant.

No. 08-5013

ORDER

Before **MURPHY, EBEL, and O'BRIEN**, Circuit Judges.

Joseph A. Ellsworth pleaded guilty to one count of interstate travel with intent to engage in sexual activity with a minor in violation of 18 U.S.C. § 2423(b). He was sentenced to thirty months of imprisonment and three years of supervised release. He did not appeal, but later he filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. The district court denied the § 2255 motion, and this court denied a certificate of appealability and dismissed the appeal. *United States v. Ellsworth*, 55 F. App'x 511, 512 (10th Cir. 2003).

Subsequently Mr. Ellsworth sought to bring a number of additional challenges to his conviction, but he was not allowed to proceed with any of them. *See* 28 U.S.C. §§ 2255(h) and 2244(b)(3) (requiring circuit court authorization for second or successive § 2255 motions). He now has filed in this court a motion

seeking authorization to file a successive § 2255 motion on the grounds of newly discovered evidence.

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. Ellsworth asserts that (1) he has newly discovered evidence, in the form of an e-mail message given to him in June 2007, that the person he was corresponding with represented herself to be nineteen years old; and (2) he has newly discovered evidence, in the form of photographs released to him in spring 2007, of ineffective assistance of counsel.

E-Mail Message

Mr. Ellsworth argues that the copy of the e-mail message he received in June 2007 constitutes newly discovered evidence that would establish his actual innocence. The message, however, was not “newly discovered evidence.”

Mr. Ellsworth may not have had a physical copy of the message before 2007, but the message’s existence was known to him at the time of his plea and sentencing. His motion for authorization states that he saw the message on the computer screen in Colorado. Mot. at 7. He also asserts that he “told his

assigned attorney . . . that E-mails should exist that prove [the screen name of the person he was traveling to meet] admitted ‘she’ was 19 . . . and these E-mails needed to be recovered from AOL’s servers.” *Id.* at 8. Moreover, he stated in his first § 2255 motion, filed in 2001:

Upon my arrest on July 7th, 1999 I immediately wrote a letter to the Tulsa Public Defenders office stating that I could not afford an attorney but immediate action must be taken to preserve exculpatory evidence within America Online (AOL) computer records. . . . An e-mail conclusively showing my innocence of crimes charged was ignored and to my knowledge AOL was never contacted for certification of this e-mail.

Dist. Ct. No. 99-CR-95-C, Doc. 46 at A. Under these circumstances, the physical copy of the e-mail message is insufficient to support a successive § 2255 motion.

Photographs

Mr. Ellsworth also argues that certain photographs that were not turned over to him until spring 2007 prove his counsel’s ineffectiveness. It appears, however, that these photographs were the subject of one of Mr. Ellsworth’s prior attempts to challenge his conviction. *See* Dist. Ct. No. 99-CR-95-C, Doc. 88 at 5-7, 13. That matter was transferred to this court, which denied authorization to proceed. *Ellsworth v. United States*, No. 05-5151 (10th Cir. Feb. 10, 2006) (unpublished order). Further, there has been no showing that this evidence “would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense” as required to support a successive § 2255 motion.

Mr. Ellsworth's motion for authorization to file a second or successive § 2255 motion is DENIED, and this matter is DISMISSED. This denial of authorization is not appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari. *See* 28 U.S.C. § 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