

FILED

United States Court of Appeals  
Tenth Circuit

UNITED STATES COURT OF APPEALS

November 28, 2012

FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker  
Clerk of Court

In re:

BARRY P. FILLMAN,

Movant.

No. 12-3304

(D.C. No. 6:06-CR-10218-JTM-1)

(D. Kan.)

ORDER

Before **MURPHY**, **EBEL**, and **TYMKOVICH**, Circuit Judges.

Movant Barry P. Fillman seeks, for the second time, this court’s certification under 28 U.S.C. § 2255(h) to file a second or successive § 2255 motion attacking his sentence. Because he again fails to make the required showing, we deny certification.

I. Background

On a day in 2006, Mr. Fillman, “[c]arrying a gun, . . . let himself into the apartment of Tammy Gannon and her 11-year-old son.” *United States v. Fillman*, 325 F. App’x 700, 701 (10th Cir. 2009). The subsequent events of that day resulted in federal and state criminal charges being filed against Mr. Fillman. In 2007, he was convicted in federal court of five counts involving firearm possession and was sentenced to 292 months. *Id.* at 702-03. We affirmed his convictions and sentence on direct appeal. *Id.* at 709.

Mr. Fillman then filed a § 2255 motion in the district court, arguing “that the indictment and subsequent conviction violated the Double Jeopardy Clause of the Fifth Amendment, his sentence was enhanced in violation of his Sixth Amendment right to a jury trial, and that he received ineffective assistance of counsel before trial, at trial, and on appeal.” *United States v. Fillman*, No. 06-10218-JTM, 2010 WL 3913602, at \*1 (D. Kan. Sept. 30, 2010). The district court denied relief, explaining that Mr. Fillman’s arguments lacked merit. *See generally id.* Mr. Fillman sought to appeal the denial of § 2255 relief, but we denied him a certificate of appealability and dismissed his appeal. *See United States v. Fillman*, 410 F. App’x 173, 176 (10th Cir.), *cert. denied*, 132 S. Ct. 287 (2011).

In June 2012, Mr. Fillman filed his first motion for authorization to file a second or successive § 2255 application. He argued that his counsel provided ineffective assistance before trial, during trial, at sentencing, and on appeal, and that his right to due process was violated because he was not allowed to testify or have witnesses testify on his behalf, and because he was sentenced based on inaccurate information. We denied his motion for authorization, explaining that these arguments had been raised and rejected before, and that the transcript of his state court proceedings and his own affidavit supporting his allegations did not constitute newly discovered evidence, contrary to his assertion. *See United States v. Fillman*, No. 12-3192, slip op. at 2 (10th Cir. Oct. 22, 2012) (unpublished order).

Mr. Fillman now again seeks this court's authorization to file a second or successive § 2255 motion. His proposed motion presents the same arguments he raised in his prior motion for authorization and § 2255 application. In fact, he concedes that he offered the same evidence "in his first § 2255 motion," but he argues that it is, in effect, newly discovered evidence because "the district court denied it was submitted." Mot. for Authorization at 9. We disagree that Mr. Fillman has presented newly discovered evidence.

## II. Discussion

Congress has placed strict limitations on second or successive § 2255 motions. We can certify a claim for filing only if the prisoner makes a prima facie showing that it contains either

(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.

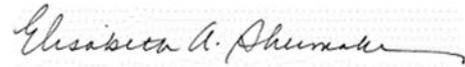
28 U.S.C. § 2255(h).

Mr. Fillman's proposed claims do not contain newly discovered evidence, and he does not assert that they rely on a new rule of constitutional law made retroactive to collateral proceedings by the Supreme Court.

Mr. Fillman's request to file a second or successive § 2255 motion is DENIED, and this proceeding is terminated. 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). We warn Mr. Fillman that any further effort by him to assert or reassert any basis for relief from his 2007 federal conviction without satisfying the requirements set forth in § 2255(h) may lead to the imposition of sanctions.

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", written in black ink on a light-colored background.

ELISABETH A. SHUMAKER, Clerk