

FILED

United States Court of Appeals

Tenth Circuit

UNITED STATES COURT OF APPEALS

September 19, 2013

FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker

Clerk of Court

In re:

CHRISTOPHER S. SNIDER,

Movant.

No. 13-6184

(D.C. No. 5:07-CR-00043-M-1)

(W.D. Okla.)

**ORDER**

Before **KELLY**, **HARTZ**, and **PHILLIPS**, Circuit Judges.

The district court held that Christopher S. Snider's "Second Pro-se Rule 60(b) Motion for Relief from the Final Judgment" required authorization under 28 U.S.C. § 2255(h), and it transferred the motion to this court. Upon this court's order to file either a motion for authorization under § 2255(h) or a motion for remand, Mr. Snider elected to file a motion for authorization. We deny authorization.

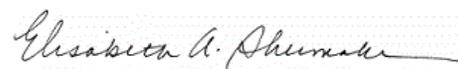
To obtain authorization, a movant must show that his claims rely on either "(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of the 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. Snider seeks authorization under both subsections.

Invoking § 2255(h)(2) for his first claim, Mr. Snider cites *Alleyne v. United States*, 133 S. Ct. 2151 (2013). But *Alleyne* does not satisfy § 2255(h)(2) because the Supreme Court has not made it retroactive to cases on collateral review. *See In re Payne*, \_\_\_ F.3d \_\_\_, No. 13-5103, 2013 WL 5200425, at \*1-\*2 (10th Cir. Sept. 17, 2013).

Invoking both § 2255(h)(1) and (h)(2) for his second claim, Mr. Snider asserts that he has new evidence and new law regarding the government's withholding of exculpatory evidence. The evidence is an affidavit from a government agent confirming that the agent seized Mr. Snider's cell phone and kept possession of it until after Mr. Snider pleaded guilty. But these facts were known to (and stated by) Mr. Snider at the time of his first § 2255 motion, which included a claim that his due process rights were violated when the government withheld his cell phone. Indeed, the affidavit that Mr. Snider now submits as newly discovered was filed by the government in the district court during that first § 2255 proceeding in response to certain motions by Mr. Snider. Accordingly, the affidavit does not satisfy § 2255(h)(1). As for his new law for this claim, Mr. Snider cites *State v. Huebler*, 275 P.3d 91 (Nev. 2012), *cert. denied*, 133 S. Ct. 988 (2013). *Huebler*, however, is a decision of the Nevada Supreme Court, not the Supreme Court of the United States, and therefore it does not satisfy § 2255(h)(2).

The motion for authorization is denied and this matter is dismissed. 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

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", written over a light blue dotted line.

ELISABETH A. SHUMAKER, Clerk