

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

June 12, 2014

FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

In re:

ELIZABETH VEGA,

Movant.

No. 14-1207
(D.C. Nos. 1:14-CV-00312-PAB &
1:09-CR-00056-PAB-2)
(D. Colo.)

ORDER

Before **BRISCOE**, Chief Judge, **EBEL** and **GORSUCH**, Circuit Judges.

Elizabeth Vega, a federal prisoner proceeding pro se, seeks authorization to file a second or successive 28 U.S.C. § 2255 motion challenging her 2011 conviction and sentence on drug-related charges. We deny authorization.

Vega pled guilty to conspiracy to distribute and to possess with intent to distribute a controlled substance, and she was sentenced to 132 months' imprisonment. She filed an appeal that was subsequently dismissed on her motion. In February 2014, she filed a motion to vacate under § 2255, raising three claims. Vega argued her motion was timely because it was filed within one year after the Supreme Court's decision in *Alleyne v. United States*, 133 S. Ct. 2151 (2013). She asserted that *Alleyne* recognized a new right that had been "made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3). The district court held that *Alleyne* does not satisfy the requirements of § 2255(f)(3) and, finding no

basis for equitable tolling, it denied Vega's motion as time-barred. She now moves this court for authorization to file a second or successive § 2255 motion.

Vega's motion cannot proceed in the district court without first being authorized by this court. *See* 28 U.S.C. § 2255(h); *id.* § 2244(b)(3). We may authorize a claim only if the prisoner makes a prima facie showing that the claim 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 [her] 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." *Id.* § 2255(h); *see also id.* § 2244(b)(3)(C).

The nature of the claim or claims that Vega seeks authorization to file is not entirely clear. But she plainly asserts that she relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.* § 2255(h)(2). For this proposition Vega again cites the Supreme Court's decision in *Alleyne*. In that case, the Court overruled its prior case law and held that under the Sixth Amendment

[a]ny fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt. Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an "element" that must be submitted to the jury.

133 S. Ct. at 2155 (citation omitted). But although *Alleyne* set forth “a new rule of constitutional law,” its ruling “has not been made retroactive to cases on collateral review by the Supreme Court.” *In re Payne*, 733 F.3d 1027, 1029 (10th Cir. 2013) (internal quotation marks omitted).

Accordingly, Vega’s motion for authorization is denied. 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 horizontal dotted line.

ELISABETH A. SHUMAKER, Clerk