

November 3, 2009

UNITED STATES COURT OF APPEALS

Elisabeth A. Shumaker
Clerk of Court

FOR THE TENTH CIRCUIT

In re:

ELGIN PHILLIPS,

No. 09-1459

Movant.

ORDER

Before **TACHA**, **EBEL**, and **KELLY**, Circuit Judges.

Elgin Phillips, a federal prisoner appearing pro se, requests authorization to file a second or successive 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence. Before a federal prisoner may file a second or successive motion under § 2255, the prisoner must first obtain an order from the court of appeals authorizing the district court to consider the motion. 28 U.S.C. §§ 2244(b)(3)(A), 2255(h). We deny authorization.

Phillips was convicted in 1997 of possession with intent to distribute cocaine and of use and carrying of a firearm in relation to a drug trafficking offense. He was sentenced to 300 months' imprisonment. His conviction was affirmed on direct appeal. *United States v. Phillips*, No. 97-1333, 1998 WL 792170, at *1 (10th Cir. Nov. 13, 1998) (unpublished). He filed a § 2255 motion in 2001, which the district court denied as time-barred. In 2005,

he filed a motion for authorization to file a second or successive § 2255 motion, which this court denied. *Phillips v. United States*, No. 05-1554 (10th Cir. Feb. 9, 2006) (unpublished order).

In his current motion for authorization to file a second or successive § 2255 motion, Phillips seeks to present a claim that, in light of the Supreme Court's recent decision in *Arizona v. Gant*, 556 U.S. ___, 129 S.Ct. 1710 (2009), the vehicle search by the police during his arrest violated his constitutional rights. To obtain authorization to file a second or successive § 2255 motion, a federal prisoner must demonstrate that his proposed claims either depend on "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," § 2255(h)(1), or rely upon "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," § 2255(h)(2). Phillips bases his motion for authorization on the new-constitutional-law prong of § 2255(h)(2).

Gant did alter the legal analysis of vehicle searches incident to arrest, holding that a search of a defendant's vehicle incident to arrest is lawful only "when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" or "when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."

129 S. Ct. at 1719 (quotation omitted); *see also United States v. Albert*, 579 F.3d 1188, 1192 n.5 (10th Cir. 2009) (recognizing *Gant*'s holding). A new rule is not "made retroactive to cases on collateral review" within the meaning of § 2255(h)(2), however, unless the Supreme Court holds it to be retroactive. *Tyler v. Cain*, 533 U.S. 656, 663 (2001). The Supreme Court has not made *Gant* retroactive to cases on collateral review.

Accordingly, authorization 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", followed by a horizontal flourish.

ELISABETH A. SHUMAKER, Clerk