

UNITED STATES COURT OF APPEALS March 26, 2012

FOR THE TENTH CIRCUIT Elisabeth A. Shumaker
Clerk of Court

In re:

LUVEN WHITEHORSE,

Movant.

No. 12-4050
(D.C. Nos. 2:03-CR-00306-DB-1 &
2:09-CV-00273-TS)
(D. Utah)

ORDER

Before **BRISCOE**, Chief Judge, **TYMKOVICH** and **MATHESON**, Circuit Judges.

Luven Whitehorse, proceeding pro se, moves for authorization to file a second or successive 28 U.S.C. § 2255 motion challenging his convictions on two counts of aggravated sexual abuse of a minor while in Indian country, in violation of 18 U.S.C. §§ 2241(c) and 1153(a). We deny authorization.

Congress has placed strict limitations on second or successive § 2255 motions. Such a 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). This court 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 [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.”

Id. § 2255(h); *see also id.* § 2244(b)(3)(C). Invoking both the “new law” and the “newly discovered evidence” prongs, Mr. Whitehorse argues that the indictment against him was deficient, failed to charge a federal offense, and violated the Fifth and Sixth Amendments because it did not allege the victim’s Indian status, which he contends is a jurisdictional element.

As new law, Mr. Whitehorse cites *United States v. Graham*, 572 F.3d 954 (8th Cir. 2009), and *Russell v. United States*, 369 U.S. 749 (1962). But *Graham* is an Eighth Circuit case, not a Supreme Court decision, and only a Supreme Court decision satisfies § 2255(h)(2). And although *Russell* is a Supreme Court decision, it also fails to satisfy § 2255(h)(2) because it is not “new” or “previously unavailable”; it was decided in 1962, long before Mr. Whitehorse’s 2004 convictions.

As for newly discovered evidence, Mr. Whitehorse asserts that he did not know of the indictment’s invalidity until he completed a reasonable investigation. A new argument regarding legal innocence, however, is not the type of “newly discovered evidence” of factual innocence required to satisfy § 2255(h)(1).

The 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", followed by a horizontal flourish.

ELISABETH A. SHUMAKER, Clerk