

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

February 21, 2014

Elisabeth A. Shumaker
Clerk of Court

In re:

ANTHONY WALTER SMITH, JR.,

Movant.

No. 14-1058
(D.C. Nos. 1:13-CV-00771-LTB &
1:91-CR-00188-LTB-4)
(D. Colo.)

ORDER

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

Anthony Walter Smith, Jr., a federal prisoner proceeding pro se, seeks authorization to file a second or successive 28 U.S.C. § 2255 motion challenging his 1993 conviction for engaging in a continuing criminal enterprise, in violation of 21 U.S.C. § 848. We deny authorization.

Smith'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 [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).

Smith seeks authorization to bring a claim that the district court violated his constitutional rights by making a drug-quantity finding that increased his mandatory minimum sentence. Smith asserts that his claim relies on “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable” under § 2255(h)(2). He cites the Supreme Court’s decision in *Alleyne v. United States*, __ U.S. __, 133 S. Ct. 2151 (2013).

Alleyne overruled prior Supreme Court case law, holding 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* sets 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, 1030 (10th Cir. 2013) (internal quotation marks omitted).

Accordingly, 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", written in black ink on a light blue dotted background.

ELISABETH A. SHUMAKER, Clerk