

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

July 8, 2014

Elisabeth A. Shumaker
Clerk of Court

In re:

JOHN WESLEY RADCLIFF,

Movant.

Nos. 14-1239
(D.C. Nos. 1:13-CV-03331-PAB &
1:99-CR-00061-PAB-2)
(D. Colo.)

ORDER

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

Movant John Wesley Radcliff has applied for authorization to file a second or successive motion under 28 U.S.C. § 2255 regarding his 2001 conviction for drug and firearm offenses. *See generally United States v. Radcliff*, 331 F.3d 1153 (10th Cir. 2003) (affirming convictions and sentence); *United States v. Radcliff*, No. 14-1076, 2014 WL 1805335 (10th Cir. May 7, 2014) (denying certificate of appealability from disposition of prior second or successive § 2255 motion and explaining circumstances surrounding dismissal of first § 2255 motion). We deny his application.

To obtain authorization, Mr. Radcliff must make a prima facie showing that his proposed § 2255 motion 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 [challenged] 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); *see also id.* § 2244(b)(3)(C). Mr. Radcliff relies exclusively on the second ground, invoking the new constitutional rule established in *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013), which held facts that increase a mandatory minimum sentence must be treated as elements of the offense. But published authority of this circuit (and others) confirms that the Supreme Court has not made *Alleyne*’s holding retroactively applicable to cases on collateral review as required for authorization under § 2255(h). *See In re Payne*, 733 F.3d 1027, 1029-30 (10th Cir. 2013); *United States v. Winkelman*, 746 F.3d 134, 136 (3d Cir. 2014) (holding, and citing other cases, to same effect).

Mr. Radcliff nevertheless argues that *Alleyne*’s retroactivity is established by the retroactivity of a seminal case he insists *Alleyne* should be traced back to for this purpose: *In re Winship*, 397 U.S. 358, 364 (1970), which held that proof beyond a reasonable doubt of all elements of a criminal charge is mandated by the Due Process Clause. In a remote and derivative sense *Winship* may be thought of as an antecedent of *Alleyne*. But, as *Payne* explained, in a direct and immediate sense “*Alleyne* is an extension of *Apprendi v. New Jersey*, 530 U.S. 466 (2000),” and “[t]he Justices have decided that other rules based on *Apprendi* do not apply retroactively on collateral review,” which “implies that the Court will not declare *Alleyne* to be retroactive.” *In re Payne*, 733 F.3d at 1030 (parallel citations and internal quotation marks

omitted). In sum, “[u]nless the Justices themselves decide that *Alleyne* applies retroactively on collateral review, we cannot authorize a successive attack based on § 2255(h).” *Id.* (internal quotation marks omitted).

Accordingly, we deny Mr. Radcliff authorization to file a second or successive § 2255 motion. 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, appearing to read "Elisabeth A. Shumaker", written in black ink on a light blue dotted background.

ELISABETH A. SHUMAKER, Clerk