

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

April 6, 2018

Elisabeth A. Shumaker
Clerk of Court

In re: KEITH MCDANIEL,

Movant.

No. 18-3063
(D.C. Nos. 2:13-CV-02083-JWL & 2:07-
CR-20168-JWL-DJW-22)
(D. Kan.)

ORDER

Before **BACHARACH, O'BRIEN**, and **MORITZ**, Circuit Judges.

Keith McDaniel, a federal prisoner proceeding pro se, moves for authorization of a second or successive 28 U.S.C. § 2255 motion to challenge his conviction for participating in a drug-trafficking conspiracy. *See* 28 U.S.C. § 2255(h). We deny authorization.

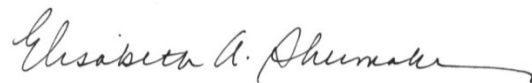
In both his direct appeal and his first § 2255 motion, Mr. McDaniel raised unsuccessful challenges to the admission of certain wiretap evidence. *See United States v. McDaniel*, 555 F. App'x 771, 772-73 (10th Cir. 2014) (§ 2255 motion); *United States v. McDaniel*, 433 F. App'x 701, 702-05 (10th Cir. 2011) (per curiam) (direct appeal). He now seeks authorization to resurrect those challenges in light of alleged prosecutorial misconduct. He proceeds under § 2255(h)(1), which requires him to present “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.” He must make a prima facie showing that he satisfies the requirements of the statute. *See* 28 U.S.C. §§ 2255(h), 2244(b)(3)(C).

The bulk of Mr. McDaniel’s motion identifies evidence that was made apparent before and during trial and during the direct appeal. Such evidence is not “newly discovered” within the meaning of § 2255(h)(1). The motion does identify one new event—the district court’s recent determination that the prosecutor in his case committed misconduct in a later case. *See United States v. Orozco*, __ F. Supp. 3d __, No. 15-20074-JAR, 2017 WL 6019613, at *10 (D. Kan. Dec. 5, 2017), *appeal filed* (10th Cir. Jan. 4, 2018) (No. 18-3003). But a finding of prosecutorial misconduct in a later, separate criminal proceeding against a different defendant does not *ipso facto* establish prosecutorial misconduct in Mr. McDaniel’s case. Nor does the determination in *Orozco* amount to a prima facie showing that no reasonable factfinder would have found Mr. McDaniel guilty of participating in the drug-trafficking conspiracy.

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".

ELISABETH A. SHUMAKER, Clerk