

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

December 19, 2019

**Elisabeth A. Shumaker
Clerk of Court**

In re: JASON CLAYCOMB,

Movant.

No. 19-8077
(D.C. Nos. 2:14-CV-00048-NDF &
2:07-CR-00196-CAB-5)
(D. Wyo.)

ORDER

Before **LUCERO, PHILLIPS**, and **CARSON**, Circuit Judges.

Jason Claycomb, proceeding pro se, seeks authorization to file a second or successive 28 U.S.C. § 2255 motion. For the following reasons, we deny authorization.

Mr. Claycomb was convicted after a jury trial of (1) conspiracy to possess with intent to distribute and distributing methamphetamine and cocaine; (2) possession of a machine gun in furtherance of a drug trafficking crime; and (3) unlawful possession of an unregistered firearm. He was sentenced to 720 months' imprisonment. We affirmed his convictions and sentence on direct appeal. He later filed a § 2255 motion based on several claims of ineffective assistance of counsel. The district court denied the motion in part and granted it in part, vacating the conviction for unlawful possession of an unregistered firearm.¹ Mr. Claycomb sought to appeal from the district court's denial of

¹ Vacating this conviction did not change the length of Mr. Claycomb's term of imprisonment because he was serving the sentence on the unregistered-firearm count concurrently with his other sentences.

his other claims, but we denied his request for a certificate of appealability. He now seeks authorization to file a second or successive § 2255 motion.

Mr. Claycomb seeks to bring two new claims of actual innocence and ineffective assistance of counsel. He asserts he has new evidence in the form of affidavits from witnesses stating that he did not possess a machine gun and an affidavit from a new attorney who states that his trial attorney knew about these witnesses but failed to call them as part of Mr. Claycomb's defense. To obtain authorization to file a second or successive § 2255 motion to raise these claims, Mr. Claycomb must make a prima facie showing that he has "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." 28 U.S.C. § 2255(h)(1); *see also id.* § 2244(b)(3)(C).

Mr. Claycomb cannot meet the standard for authorization in § 2255(h)(1). The affidavit attached to his proposed § 2255 motion explains that he told his attorney prior to trial that he was innocent of the machine-gun charge and that he wanted his attorney to call Mia Brown as a defense witness because she would exonerate him on the machine-gun charge. He further explains in his affidavit that his attorney did not call Ms. Brown to testify at trial. These statements show Mr. Claycomb knew at the time of trial and prior to his first § 2255 motion of the facts that could support his new claims of actual innocence and ineffective assistance of counsel. Although he has attached new affidavits from Ms. Brown, Aaron Zupetz, and Andrea Hall, the information in those affidavits is not newly discovered because it supports the statements in his affidavit that

he knew of his innocence prior to trial, he knew witnesses who would testify he did not possess the machine gun, he asked his attorney to call those witnesses at trial, and his attorney refused to call those witnesses.²

Because Mr. Claycomb knew of the evidence to support his new claims prior to filing his first § 2255 motion, he has not met the standard for authorization in § 2255(h)(1). Accordingly, we deny his 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, reading "Elisabeth A. Shumaker", followed by a horizontal line.

ELISABETH A. SHUMAKER, Clerk

² He has also attached a copy of what he says is an excerpt from his trial transcript in which witness Janet Davis testified that she had never seen Mr. Claycomb with any firearms. This shows the jury heard testimony from at least one witness at Mr. Claycomb’s trial who said he did not possess the machine gun.