

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

June 9, 2020

Christopher M. Wolpert
Clerk of Court

In re: MONTGOMERY CARL AKERS,

Movant.

No. 20-3092
(D.C. Nos. 2:04-CR-20089-KHV-1 &
2:09-CV-02206-KHV)
(D. Kan.)

ORDER

Before **TYMKOVICH**, Chief Judge, **LUCERO** and **MORITZ**, Circuit Judges.

Montgomery Carl Akers, proceeding pro se,¹ seeks authorization to file a second or successive 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. Because he has not met the requisite conditions for authorization under § 2255(h), we deny authorization.

In 2006, while serving a 105-month sentence for bank fraud and other offenses, Akers pleaded guilty to wire fraud, an offense he committed from prison. The district court sentenced him to 327 months in prison. We affirmed his sentence. *United States v. Akers*, 261 F. App'x 110, 116 (10th Cir. 2008).

Akers filed his first § 2255 motion in 2009. Among other things, he claimed counsel was ineffective because she coaxed him into pleading guilty to a crime that was

¹ Because Akers is pro se, we construe his filings liberally. See *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam); *Garza v. Davis*, 596 F.3d 1198, 1201 n.2 (10th Cir. 2010).

legally impossible for him to have committed. The district court denied the § 2255 motion on the merits and denied a certificate of appealability (COA). We denied his request for a COA and dismissed the appeal. *United States v. Akers*, 384 F. App'x 758, 759 (10th Cir. 2010) (per curiam).

Since then, Akers has filed numerous unsuccessful second or successive habeas petitions in federal district court and requests in this court for COAs to allow him to appeal the denial of those petitions, the most recent of which was a March 2019 motion to void the judgment that the district court denied as an unauthorized second or successive § 2255 motion. *See United States v. Akers*, No. 19-3254, 2020 WL 1650652, at *5 (10th Cir. Apr. 3, 2020) (denying a COA). Most of Akers' previous filings, including the March 2019 motion, raised variations on the same claims his current application seeks authorization to raise: (1) "[i]t was legally and factually impossible for [him] to have committed any crime from [prison]" so he is "actually innocent of any crimes as alleged in the indictment and superseding indictment," Mot. for Auth. at 19; and (2) it was "factually impossible for [him] to have committed the crime of wire fraud against a financial institution," *id.* at 21.

Akers maintains that his claims are based on newly discovered evidence and he seeks authorization under § 2255(h)(1). *See also* 28 U.S.C. § 2244(b)(3)(C). To obtain authorization based on a new factual predicate, he must show that the "newly discovered evidence, . . . 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).

Akers' proposed claims do not meet these requirements. Neither his motion for authorization nor his proposed district court filing cites any new facts, much less facts that would demonstrate his actual innocence. In fact, in explaining the factual basis for his proposed claims, he "reincorporate[d] the facts" he relied on to support the claims he raised in his first § 2255 motion over a decade ago and in his March 2019 motion to void the judgment. Mot. for Auth. at 20.

Because Akers has not met the requirements for authorization in § 2255(h), we deny his motion. The 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 black ink, appearing to read 'C. M. Wolpert', with a long horizontal stroke extending to the right.

CHRISTOPHER M. WOLPERT, Clerk