

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARCUS ALLEN - PETITIONER

vs.

UNITED STATES OF AMERICA - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-2474

Marcus Allen, Marcus Laverne Allen, originally named, also known as House

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

No: 17-2880

Marcus Allen, Marcus Laverne Allen, originally named, also known as House

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Eastern District of Arkansas - Little Rock
(4:17-cv-346-KGB)
(4:17-cv-00346-KGB)

JUDGMENT

Before BENTON, MURPHY and KELLY, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied, affirming the denial of the motions for a

Appendix A

new trial and related relief. The motion to proceed pro se is denied as moot. The appeal is dismissed.

December 20, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-2474

Marcus Allen, Marcus Laverne Allen, originally named, also known as House
Appellant

v.

United States of America
Appellee

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Appellant
v.
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Appeal from U.S. District Court for the Eastern District of Arkansas - Little Rock
(4:17-cv-346-KGB)
(4:17-cv-00346-KGB)

ORDER

The petition for rehearing by the panel is denied.

February 07, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix B.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA

PLAINTIFF

v.

Case No. 4:14-cr-00057-001 KGB

MARCUS ALLEN

DEFENDANT

ORDER

Pending before the Court are several motions filed pro se by defendant Marcus Allen. First is Mr. Allen's pro se motion for new trial under newly discovered evidence in the interest of justice (Dkt. No. 216). Second is Mr. Allen's motion to compel the government to respond to pro se motion for new trial under newly discovered evidence in the interest of justice in 14 days or be in default (Dkt. No. 217). Third is Mr. Allen's pro se motion for default judgment (Dkt. No. 218). Fourth is Mr. Allen's pro se motion to amend motion for new trial under newly discovered evidence in the interest of justice (Dkt. No. 219). Mr. Allen's fifth and final motion pending at this time is his pro se motion for post-conviction evidentiary hearing pursuant to amended pro se motion for new trial under newly discovered evidence in the interest of justice (Dkt. No. 221). The Court has reviewed each of Mr. Allen's motions. For the reasons set out below, the Court denies each of Mr. Allen's motions.

Each of Mr. Allen's motions is predicated on his motion for a new trial (Dkt. No. 216). The Court will consider this motion along with his motion to amend his motion for new trial (Dkt. Nos. 216, 219). In each of these motions, Mr. Allen requests that the Court grant him a new trial and alleges that the government failed to disclose Jenk's material, violating the Jenk's Act, Brady and Giglio, the Sixth and Fourteenth Amendments, and Mr. Allen's right to effective cross-examination.

While Mr. Allen does mention testimony by a witness he refers to as C.S., he does not describe in any way the nature of the evidence that he alleges the government withheld.

In order to receive a new trial, Mr. Allen must show: (1) the evidence was unknown or unavailable at the time of trial; (2) he was duly diligent in attempting to uncover the evidence; (3) the newly discovered evidence is material; and (4) the newly discovered evidence is such its emergence probably will result in an acquittal upon retrial. *United States v. Meeks*, 742 F.3d 838, 840 (8th Cir.), cert. denied, 135 S. Ct. 152, 190 L. Ed. 2d 111 (2014) (citing *Fed. R. Crim. P.* 33(b)); *United States v. Rubashkin*, 655 F.3d 849, 857 (8th Cir. 2011)). “[I]n order to meet the materiality requirement, newly discovered evidence must be ‘more than merely . . . impeaching.’” *Id.* (quoting *United States v. Baker*, 479 F.3d 574 (8th Cir. 2007); *United States v. Dogskin*, 265 F.3d 682 (8th Cir. 2001)).

Here, the motion fails to disclose the nature of the alleged newly discovered evidence. The Court cannot determine whether the evidence is material or would probably result in acquittal upon retrial because Mr. Allen has not made any showing of what the newly discovered evidence is or would be. See, e.g., *Edwards v. United States*, 361 F.2d 732 (8th Cir. 1966) (holding the trial court did not abuse its discretion in denying a motion for new trial on the ground of newly discovered evidence when there was no showing what the newly discovered evidence would be). Therefore, the Court denies Mr. Allen’s motion for a new trial; his motion to compel the government to respond to his motion for a new trial, and his motion to amend his motion for a new trial (Dkt. Nos. 216, 217, 219).

Mr. Allen’s motion for a default judgment is based on his contention that the government has failed to respond to his motion to compel the government to respond to his motion for a new trial

(Dkt. No. 218). A default judgment is not appropriate in this circumstance. Procedurally, Mr. Allen was found guilty by a jury (Dkt. Nos. 100, 101, 102). This Court then sentenced Mr. Allen and entered judgment (Dkt. Nos. 175, 180). The Court is past the default judgment stage. In addition, Mr. Allen has filed multiple motions for acquittal or a new trial (Dkt. Nos. 111, 122, 128, 136, 144, 149, 152, 167, 184, 207). The government filed at least two responses (Dkt. Nos. 112, 185). The Court issued orders addressing each of these motions (Dkt. Nos. 117, 123, 129, 142, 147, 154, 168, 209). The United States Court of Appeals for the Eighth Circuit affirmed the judgment in this case (Dkt. No. 212). To the extent that Federal Rule of Civil Procedure 55 is applicable to this criminal case, it cannot be said that the government has failed to plead or otherwise defend this case. Therefore, default judgment is not appropriate. Fed. R. Civ. P. 55(a).

Mr. Allen's remaining motion is his motion for an evidentiary hearing (Dkt. No. 221). In this motion, he contends that the government failed to provide copies of transcripts of an interview with C.S., the witness mentioned in his motions for new trial. Absent exceptional circumstances, a motion for new trial based on newly discovered evidence may be decided on affidavits without a hearing. *Dogskin*, 265 F.3d at 687 (citing *United States v. Provost*, 969 F.2d 617 (8th Cir. 1992); *United States v. Bednar*, 776 F.2d 236 (8th Cir. 1985); *United States v. Ward*, 544 F.2d 975 (8th Cir. 1976)). Here, Mr. Allen has not provided any affidavits to support his motion for new trial and has not provided this Court with any basis for conducting an evidentiary hearing. This Court will not order an evidentiary hearing based on nothing more than conclusory statements and unsupported allegations.

Mr. Allen's motions are denied (Dkt. Nos. 216, 217, 218, 219, 221).

It is so ordered this 29th day of November, 2016.

Kristine G. Baker
Kristine G. Baker
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA

PLAINTIFF

v.

Case No. 4:14-cr-00057-001 KGB
Related Case No. 4:17-cv-00346 KGB

MARCUS ALLEN

DEFENDANT

ORDER

Before the Court are a series of motions filed *pro se* by defendant Marcus Allen: a motion for leave to proceed *in forma pauperis*, construed by the Clerk as a motion for leave to appeal *in forma pauperis* (Dkt. No. 225); a motion to withdraw his notice of appeal and motion for leave to appeal *in forma pauperis* (Dkt. No. 227); a motion for new trial (Dkt. No. 228); a motion to amend the motion for new trial (Dkt. No. 229); a second motion to amend the motion for new trial (Dkt. No. 230); a motion for post-conviction evidentiary hearing (Dkt. No. 231); a motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 (Dkt. No. 232); a motion for evidentiary hearing (Dkt. No. 233); and a motion to proceed *pro se* (Dkt. No. 234).

Subsequently, Mr. Allen filed a motion to withdraw the latter three motions¹ (Dkt. No. 235). Mr. Allen next filed a series of similar, though not identical motions, namely a second motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 (Dkt. No. 236); a second motion for evidentiary hearing (Dkt. No. 237); and a second motion to proceed *pro se* (Dkt. No. 238). At the outset, the Court grants Mr. Allen's motion to withdraw the first series of motions (Dkt. No. 235). Thus, the Court denies as moot the motion to vacate, set aside, or correct sentence

¹ This motion seeks to withdraw the motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 (Dkt. No. 232); the motion for evidentiary hearing (Dkt. No. 233); and the motion to proceed *pro se* (Dkt. No. 234).

under 28 U.S.C. § 2255 (Dkt. No. 232); the motion for evidentiary hearing (Dkt. No. 233); and the motion to proceed *pro se* (Dkt. No. 234). The Court next turns to the other motions that remain pending.

I. Procedural Background

By jury verdict dated November 19, 2014, Mr. Allen was found guilty of: (1) being a felon in possession of a firearm; (2) possession with intent to distribute a controlled substance; and (3) possession of a firearm in furtherance of a drug trafficking crime (Dkt. Nos. 100, 101, 102).

Subsequently, the Court entered judgment sentencing Mr. Allen to a total of 360 months in prison and 6 years of supervised release (Dkt. No. 180). This Court granted Mr. Allen's motion for leave to appeal *in forma pauperis* (Dkt. No. 190). On appeal, the Eighth Circuit Court of Appeals affirmed this Court's judgment (Dkt. No. 212). Subsequently, this Court denied a series of motions that sought a new trial (Dkt. No. 222). The Supreme Court of the United States denied Mr. Allen's petition for a writ of *certiorari* (Dkt. No. 226).

II. Post-Trial Motions In Criminal Case

Mr. Allen's criminal case is closed. With the criminal action having already proceeded on appeal to the Eighth Circuit Court of Appeals with a petition for a writ of *certiorari* denied by the Supreme Court of the United States, Mr. Allen has exhausted his right to direct appeal of his conviction and sentence. This Court has previously denied Mr. Allen's motion for a new trial (Dkt. No. 209). Therefore, the Court denies the following motions as improperly filed: the motion for leave to appeal *in forma pauperis* (Dkt. No. 225); the motion for new trial (Dkt. No. 228); the motion to amend motion for new trial (Dkt. No. 229); the second motion to amend motion for new

trial (Dkt. No. 230); and the motion for post-conviction evidentiary hearing² (Dkt. No. 231). The Court denies as moot the motion to withdraw the notice of appeal and motion for leave to appeal *in forma pauperis* (Dkt. No. 227).

As recounted above, Mr. Allen has submitted a series of additional filings in his criminal case since his criminal case was closed (Dkt. Nos. 216, 217, 218, 219, 221, 224, 225, 227, 228, 229, 230, 231, 232, 233, 234, 235). Pursuant to orders of the Eighth Circuit Court of Appeals and the United States Supreme Court, Mr. Allen has exhausted his right to appeal this conviction and sentence (Dkt. Nos. 215, 226). The Court directs the Clerk not to accept any additional filings submitted by Mr. Allen in his closed criminal case without first obtaining leave from this Court.

III. Motions Filed Under 28 U.S.C. § 2255

The motions that remain pending are Mr. Allen's second motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 (Dkt. No. 236); the second motion for an evidentiary hearing pursuant to the § 2255 motion (Dkt. No. 237); and the second motion to proceed *pro se* (Dkt. No. 238).³ "A federal inmate generally must challenge a conviction or sentence through a § 2255 motion." *Lopez-Lopez v. Sanders*, 590 F.3d 905, 906 (8th Cir. 2010) (citing *Abdullah v. Hedrick*, 392 F.3d 957, 959 (8th Cir. 2004)). The Court has conducted the preliminary review required by Rule 4(b) of the Rules Governing Section 2255 Proceedings,⁴ and the Court has determined that Mr. Allen is not entitled to relief under 28 U.S.C. § 2255.

² In this motion, Mr. Allen requests an evidentiary hearing pursuant to the motion for new trial (Dkt. No. 228).

³ Mr. Allen's motions to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 are also docketed in the related case, Case No. 4:17-cv-00346.

⁴ Rule 4(b) of the Rules Governing Section 2255 Proceedings provides, in relevant part, that a judge who receives a motion must promptly examine it. The Court must dismiss the motion and direct the clerk to notify the moving party of the dismissal if, after examining the motion, any attached exhibits, and the record of the prior proceedings, the Court determines that the moving party is not entitled to relief.

Section 2255(a) provides as follows:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence.

28 U.S.C. § 2255(a).

For his second motion under § 2255, Mr. Allen posits three grounds to request that this Court vacate, set aside, or correct the sentence. First, Mr. Allen argues that he was denied the right to a fair trial due to the government's alleged failure to disclose a transcript of an interview with a witness (Dkt. No. 236 at 9-10). Second, Mr. Allen argues that the attorneys for the government engaged in prosecutorial misconduct (Dkt. No. 232 at 10-11). Third, Mr. Allen argues that the government's alleged failure to disclose the interview transcript was done in bad faith (Dkt. No. 11-12).

For purposes of § 2255(a), Mr. Allen does not contend that this Court was without jurisdiction to impose his sentence, nor does Mr. Allen contend that the sentence was in excess of the maximum authorized by law. Essentially, the Court construes each of Mr. Allen's claims as arguing that the government's alleged failure to disclose a witness transcript amounted to causing the imposition of a sentence "in violation of the Constitution or laws of the United States."

Mr. Allen attaches two exhibits to his § 2255 motion: Exhibit A consists of a portion of this Court's pretrial order for criminal cases (Dkt. No. 13), and Exhibit B consists of portions of the trial testimony of Jonathan Smith, a witness for the government (Dkt. No. 232). As noted in the pretrial order, "a motion is not required for discovery under the

Federal Rules of Criminal Procedure.” Fed. R. Crim. P. 16. The government must provide discovery upon a defendant’s request, not upon a motion or upon an order. *See* 2 C. Wright, Federal Practice and Procedure: Criminal 2d § 675. In accordance with the Jencks Act, codified at 18 U.S.C. § 3500, no “statement or report” in the possession of the United States which was made by a government witness or prospective government witness is subject to subpoena, discovery, or inspection “until said witness has testified on direct examination in the trial of the case.” 18 U.S.C. § 3500(a). Upon such testimony on direct examination, the Court shall, on motion of the defendant, order the government to produce such a pretrial statement or report. 18 U.S.C. § 3500(b).

Mr. Allen does not point the Court to any evidence in the record that would indicate that there exists a transcript of a pretrial statement made by Mr. Smith that would have been discoverable under the Jencks Act and Rule 16 of the Federal Rules of Criminal Procedure. Assuming, without deciding, that such a transcript does in fact exist, Mr. Allen does not assert that he made a request for such a statement at any point after Mr. Smith’s trial testimony. Absent such a request, neither Rule 16 nor 18 U.S.C. § 3500(b) requires the government to furnish such material.

Because the government was under no obligation to disclose this material, its failure to do so could not have “directly impacted the fairness of [Mr. Allen’s] trial,” as alleged in Mr. Allen’s § 2255 motion (Dkt. No. 236, at 13). For the same reason, counsel for the United States did not engage in prosecutorial misconduct. Finally, absent a duty to disclose, a failure to do so could not have been done in bad faith. In sum, the Court determines that Mr. Allen has not met his burden to show that the sentence was imposed in violation of the Constitution or laws of the United States. Therefore, the Court denies

Mr. Allen's motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 (Dkt. No. 236).

Due to the denial of Mr. Allen's § 2255 motion, the Court denies as moot Mr. Allen's motion for an evidentiary hearing and motion to proceed *pro se* (Dkt. Nos. 237, 238). The Court acknowledges that a movant is entitled to an evidentiary hearing unless "the motion and the files and records of the case conclusively show that [he] is entitled to no relief." *Anjulo-Lopez v. United States*, 541 F.3d 814, 817 (8th Cir. 2008) (quoting 28 U.S.C. § 2255). No such hearing is required "where the claim is inadequate on its face or the record affirmatively refutes the factual assertions upon which it is based." *Watson v. United States*, 493 F.3d 960, 963 (8th Cir. 2007) (internal quotation omitted). The Court determines that an evidentiary hearing is not required here and disposes of the § 2255 motion in a summary manner "as justice dictates," in accord with Rules 4(b) and 8(a) of the Rules Governing Section 2255 Proceedings.

A movant is required to obtain a certificate of appealability from a district or circuit judge, determining that the movant has made a substantial showing of the denial of a constitutional right, before appealing from a final order entered in a § 2255 proceeding. 28 U.S.C. §§ 2253(c)(1)(B), (c)(2). This Court determines Mr. Allen cannot satisfy this standard and, therefore, declines to issue a certificate of appealability.

IV. Conclusion

For the foregoing reasons, the Court denies all pending motions filed by Mr. Allen in this action (Dkt. Nos. 225, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238). The Court declines to issue a certificate of appealability to Mr. Allen with respect to his motion to vacate, set aside, or correct sentence under 28 U.S.C. §2255 (Dkt. No. 236).

Finally, the Court directs the Clerk not to accept any additional filings submitted by Mr. Allen in his closed criminal case without first obtaining leave from this Court.

It is so ordered this the 21st day of June, 2017.

Kristine G. Baker

Kristine G. Baker
United States District Judge

**Additional material
from this filing is
available in the
Clerk's Office.**