

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

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|---------------------------|---|--------------------------|
| DANIEL CANTU, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| v. |) | Case No. 98-10079-02-WEB |
| |) | 04-3394-WEB |
| UNITED STATES OF AMERICA, |) | |
| |) | |
| Respondent. |) | |

MEMORANDUM AND ORDER

Now before the Court are Petitioner's motions relating to 28 U.S.C. § 2255. (Docs. 252, 253). A review of the record reflects that Petitioner was convicted on November 18, 1998 and was sentenced to 272 months in prison on February 11, 1999. Petitioner filed a motion for relief under 28 U.S.C. § 2255 on January 31, 2000 alleging, *inter alia*, ineffective assistance of counsel. (Doc. 187). The Court denied this motion in a memorandum dated April 20, 2000. (Docs. 194). On October 29, 2004, Petitioner filed a second motion to vacate his sentence pursuant to 28 U.S.C. § 2255 and asserted a claim for relief under *Blakely v. Washington*, 124 S. Ct. 2531 (2004). (Doc. 240). Instead of appropriately transferring the motion to the Tenth Circuit, the Court dismissed it as a second petition under section 2255 on November 2, 2004. (Doc. 241).

Petitioner has filed a motion to supplement his October 29, 2004 petition and a motion to determine the status of his October 29, 2004 petition. (Docs. 252, 253). In these two motions, Petitioner re-asserts his claim for relief under *Blakely v. Washington*, 124 S. Ct. 2531 (2004) and asserts a new claim for relief under *Burton v. Waddington*, 142 Fed. Appx. 297 (9th Cir. 2005). The Court will treat these motions as successive motions for relief under 28 U.S.C. § 2255.

Under 28 U.S.C. § 2255, a successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain:

(1) newly discovered evidence that, if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the 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 para. 8.

Under 28 U.S.C. § 2244(b)(3), an applicant shall move the appropriate court of appeals for an order authorizing the district court to consider a second or successive application for relief under § 2255. See *Leonard v. United States*, 383 F.3d 1146, 1147 (10th Cir. 2004). The record shows Petitioner did not obtain authorization from the Tenth Circuit Court of Appeals to file this successive § 2255 motion; therefore, this Court has no jurisdiction to consider the merits. See *United States v. Avila-Avila*, 132 F.3d 1347, 1348-1349 (10th Cir. 1997).

When an applicant files a successive § 2255 motion without first seeking the required authorization, the district court must transfer the motion to the appellate court in the interest of justice pursuant to 28 U.S.C. § 1631. *Coleman v. United States*, 106 F.3d 339, 341 (10th Cir. 1997).

IT IS ORDERED FOR THE REASONS SET FORTH ABOVE that Petitioner's motions be treated as successive motions for relief pursuant to 28 U.S.C. § 2255 (Docs. 252, 253) and be transferred to the Tenth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631.

IT IS FURTHER ORDERED that the Clerk of the Court shall forward a copy of the Petitioner's motions (Docs. 252, 253) and this order to the Clerk of the Tenth Circuit Court of Appeals for processing under 28 U.S.C. § 2244(b)(3).

SO ORDERED this 28th day of November, 2006.

s/ Wesley E. Brown

Wesley E. Brown, Senior U.S. District Judge