

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION

ELISA SOTELO MACIAS, #14469-078	§	
VS.	§	CIVIL ACTION NO. 4:09CV333 CRIMINAL ACTION NO. 4:07CR91(7)
UNITED STATES OF AMERICA	§	

MEMORANDUM OPINION AND ORDER

Movant Elisa Sotelo Macias filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. §2255. This court dismissed the case on September 17, 2012, based on the waiver included in her knowing and voluntary plea of guilty. Movant now files a “motion to obtain relief of a newly recognized right of *Alleyne* by the United States Supreme Court.”

Postjudgment Motion for Relief

The Fifth Circuit has observed that “[a]ny motion that draws into question the correctness of a judgment is functionally a motion under Civil Rule 59(e), whatever its label.” *Harcon Barge Co. v. D&G Boat Rentals, Inc.*, 784 F.2d 665, 669-70 (5th Cir. 1986) (en banc) (citing 9 Moore’s Federal Practice ¶ 204.12[1] at 4-67 (1985)). “Rule 59(e) serves the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence. . . . Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly.” *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004) (internal citations and quotations omitted). The Fifth Circuit recognizes that Rule 59(e) “favor[s] the denial of motions

to alter or amend a judgment.” *Southern Constructors Group, Inc. v. Dynalectric Co.*, 2 F.3d 606, 611 (5th Cir. 1993).

If a motion for relief from judgment is filed within twenty-eight (28) days of final judgment, the motion should be filed as a motion under Rule 59 rather than Rule 60. Fed. R. Civ. P. 59(e); *Ford v. Elsbury*, 32 F.3d 931, 937 (5<sup>th</sup> Cir. 1994) (citing *Lavespere v. Niagara Mach. & Tool Works, Inc.* 910 F.2d 167, 173 (5<sup>th</sup> Cir. 1990)). If the motion is served after that time, it falls under Rule 60(b). Fed. R. Civ. P. 60(b). The instant motion was filed almost one year after final judgment; thus, it is properly filed under Rule 60(b). Because Movant has filed a Rule 60(b) motion directed to a procedural ruling that barred consideration of the merits, the instant motion is not considered “successive” and is properly brought as a Rule 60(b) motion. *Tamayo v. Stephens*, 740 F.3d 986, 990 (5<sup>th</sup> Cir. 2014).

#### Retroactive Application of *Alleyne v. United States*

Movant claims that she is entitled to relief based on a recent decision by the United States Supreme Court in *Alleyne v. United States*, ---U.S. ----, 133 S. Ct. 2151, 186 L. Ed.2d 314 (2013). In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed.2d 435 (2000), the Supreme Court stated, “[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum just be submitted to a jury, and proved beyond a reasonable doubt.” *Id.*, 530 U.S. at 490, 120 S. Ct. at 2362-63. In *Alleyne*, the Supreme Court concluded that “the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum.” *Alleyne*, 133 S. Ct. at 2163. Thus, any fact that increases a defendant’s mandatory minimum sentence is an element of the crime, not merely a sentencing factor that must be submitted to the jury and found beyond a reasonable doubt. *Id.*

Assuming *Alleyne* is applicable to Movant's case, she cannot prevail. The Supreme Court must have specifically held that a newly recognized right applies retroactively to cases on collateral review. *Tyler v. Cain*, 533 U.S. 656, 662-63, 121 S. Ct. 2478, 150 L. Ed.2d 632 (2001). The Supreme Court did not declare that the *Alleyne* rule applies retroactively on collateral review. Furthermore, given that *Alleyne* is an extension of *Apprendi*, which is not retroactive on collateral review, it is doubtful that *Alleyne* will be. *In re Kemper*, 735 F.3d 211, 212 (5<sup>th</sup> Cir. 2013). Accordingly, Movant's motion fails. Movant has not shown a manifest error of law or fact in order to obtain relief under Rule 60(b).

IT IS THEREFORE ORDERED that Petitioners' motion for relief from judgment filed pursuant to Fed. R. Civ. P. 60(b) [Doc. #17] is **DENIED**. All motions not previously ruled upon are **DENIED**.

So **ORDERED** and **SIGNED** this 7 day of **April, 2014**.



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Ron Clark, United States District Judge