

January 18, 2011

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker  
Clerk of Court

In re:

MARIANO BEDOLLA,

Movant.

No. 10-3335

**ORDER**

Before **BRISCOE**, Chief Judge, **GORSUCH** and **HOLMES**, Circuit Judges.

Mariano Bedolla, a federal prisoner appearing pro se, has filed a motion seeking authorization to file a second or successive 28 U.S.C. § 2255 motion challenging his conviction and sentence. Before a federal prisoner may file a second or successive motion under § 2255, the prisoner must first obtain an order from the court of appeals authorizing the district court to consider the motion. 28 U.S.C. §§ 2244(b)(3)(A), 2255(h). We deny authorization.

Mr. Bedolla was convicted in March 2005, of four drug-related offenses, including conspiracy to distribute more than 500 grams of methamphetamine and possession with intent to distribute more than 1.5 kilograms of methamphetamine mixture. He was sentenced to 235 months' imprisonment.

Mr. Bedolla's convictions were affirmed on direct appeal. *See United States v. Bedolla*, 232 F. App'x 805, 811 (10th Cir. 2007). He filed a § 2255

motion in August 2008, stating only that he intended to raise a claim of ineffective assistance of counsel once he received all of his legal documents from his attorney. The district court granted him five extensions of time, but eventually denied the motion, finding that Mr. Bedolla had failed to identify any claim. *United States v. Bedolla*, No. 04-cr-40001, 2009 WL 1379306 (D. Kan. May 18, 2009) (unpublished order).

Mr. Bedolla has now filed the present motion for authorization to file a second or successive § 2255 motion. To obtain authorization to file a second or successive § 2255 motion, a federal prisoner must demonstrate that his proposed claims either depend on “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,” § 2255(h)(1), or rely upon “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,” § 2255(h)(2).

Mr. Bedolla first seeks to present a claim that his defense counsel prejudiced him by ignoring his attempts to obtain his legal documents in his first § 2255 motion and the district court erred in not providing him with a paid copy of his sentencing transcript. He argues this claim is based on new law, citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005). He further argues

this claim is based on new evidence, namely his sentencing transcripts. None of the cases cited by Mr. Bedolla satisfies the § 2255(h)(2) new-law requirement because *Apprendi*, *Blakely*, and *Booker* do not apply retroactively to second or successive § 2255 motions. *Bey v. United States*, 399 F.3d 1266, 1268-69 (10th Cir. 2005). Further, Mr. Bedolla's receipt of his sentencing transcript does not satisfy § 2255(h)(1)'s requirement that the purported new evidence be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found him guilty of the offense.

Mr. Bedolla also wishes to present numerous claims that his defense counsel was constitutionally ineffective for failing to assert a claim under *Apprendi*, failing to argue that his firearm sentence enhancement was not supported by facts found by a jury, and failing to argue that Mr. Bedolla was entitled to downward departures and variances under 18 U.S.C. § 3553(a). Mr. Bedolla argues that these proposed claims are supported by new law and new evidence, citing generally to an attached fifty-two page memorandum. This memorandum does not set forth any basis for his new-law and new-evidence assertion. Mr. Bedolla has failed to make a prima facie showing that his proposed claims satisfy the § 2255(h) gatekeeping requirements.

Because Mr. Bedolla's proposed claims do not meet the requirements for authorization under § 2255(h), his motion for authorization is DENIED. This

denial of authorization is not 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".

ELISABETH A. SHUMAKER, Clerk