

UNITED STATES COURT OF APPEALS June 30, 2010

Elisabeth A. Shumaker  
Clerk of Court

FOR THE TENTH CIRCUIT

In re:

CARLOS A. GAMEZ-ACUNA,  
  
Movant.

No. 10-4109  
(D.C. Nos. 2:10-CV-00066-DAK &  
2:07-CR-00156-DAK-1)  
(D. of Utah)

---

**ORDER**

---

Before **GORSUCH**, **EBEL**, and **HOLMES**, Circuit Judges.

---

Carlos A. Gamez-Acuna has filed a motion seeking authorization to file a second or successive 28 U.S.C. § 2255 motion. On January 28, 2010, Mr. Gamez-Acuna filed a § 2255 motion in district court. On February 16, the district court dismissed that § 2255 motion without prejudice because the motion had been prematurely filed while Mr. Gamez-Acuna's direct appeal was still pending. On March 19, we issued a ruling on his direct appeal. Because Mr. Gamez-Acuna's prior § 2255 motion was not adjudicated on the merits and was dismissed without prejudice, he does not need authorization from this court to file another § 2255 motion in district court. *Cf. McWilliams v. Colorado*, 121 F.3d 573, 575 (10th Cir. 1997) (holding that habeas petition filed after prior petition was dismissed without prejudice for failure to exhaust administrative

remedies was not a second or successive petition within the meaning of the statute); *see also Villanueva v. United States*, 346 F.3d 55, 60 (2d Cir. 2003) (explaining that “a § 2255 petition will not be considered second or successive unless a prior § 2255 petition was adjudicated *on the merits*”). Accordingly, we DISMISS as unnecessary Mr. Gamez-Acuna’s motion for authorization.

Entered for the Court,

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a horizontal flourish.

ELISABETH A. SHUMAKER, Clerk