

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

June 12, 2012

FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

In re:

JOSE FRANCISCO DIAZ,

Movant.

No. 12-2086
(D.C. Nos. 1:08-CV-00344-MV-LFG
& 2:03-CR-02112-MV-7)
(D. N.M.)

ORDER

Before **LUCERO, MURPHY**, and **HOLMES**, Circuit Judges.

Jose Francisco Diaz moves pro se for authorization to file a second or successive 28 U.S.C. § 2255 motion challenging his conviction for conspiracy to possess with intent to distribute 1,000 kilograms or more of marijuana within 1,000 feet of a school and within 1,000 feet of a truck stop. We deny authorization.

In his motion, Diaz describes his claim as:

Applicant was unconstitutionally and categorically enhanced a 2 level adjustment for the 1,000 feet of a school and[] 1,000 feet of a truck stop, there was never sufficient evidence placing Diaz at either 1,000 feet of a school[] or[] 1,000 feet of a truck stop. His [trial] attorney failed to make any argument to these facts.

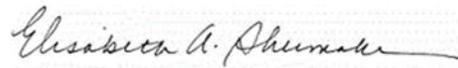
Mot. at 5.

“Federal prisoners are barred from attacking their federal convictions through second or successive § 2255 motions except in very limited circumstances.” *United States v. Kelly*, 235 F.3d 1238, 1241 (10th Cir. 2000). “Second or successive § 2255 motions are restricted to claims involving either newly discovered evidence strongly

suggestive of innocence or new rules of constitutional law made retroactive by the Supreme Court.” *Brace v. United States*, 634 F.3d 1167, 1170 (10th Cir. 2011) (quotation and ellipsis omitted). Diaz’s claim fails to qualify under either requirement. Specifically, he has failed to bring to light new evidence that casts doubt upon his guilt. *See* 28 U.S.C. § 2255(h)(1) (describing newly discovered evidence as such evidence that clearly and convincingly establishes “that no reasonable factfinder would have found the movant guilty of the offense”); *see also In re Dean*, 341 F.3d 1247, 1249 (11th Cir. 2003) (stating that § “2255’s newly discovered evidence exception . . . does not apply to claims asserting sentencing error”). Nor has Diaz presented a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court. *See id.* § 2255(h)(2).

Accordingly, Diaz’s motion is DENIED. This denial of authorization “shall not be 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



ELISABETH A. SHUMAKER, Clerk