

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

December 11, 2012

FOR THE TENTH CIRCUIT

**Elisabeth A. Shumaker
Clerk of Court**

In re:

JOSE CARLOS ARRAS,

Movant.

No. 12-2195
(D.C. No. 2:02-CR-00598-MCA-1)
(D. N.M.)

ORDER

Before **KELLY, HOLMES, and MATHESON**, Circuit Judges.

Jose Carlos Arras seeks authorization to file a second or successive motion under 28 U.S.C. § 2255 challenging the 262-month sentence he received after his 2002 conviction for conspiracy to import, and to possess with intent to distribute, 100 kilograms or more of marijuana, in violation of 21 U.S.C. §§ 963 and 841(a)(1), respectively. He claims that his counsel was constitutionally ineffective in failing to properly inform and advise him regarding a plea offer from the government that would have limited his sentence to 87 months. Because Mr. Arras cannot satisfy the relevant statutory conditions, we deny authorization to pursue this claim.

We may authorize a second or successive claim on a prima facie showing that it relies on (1) “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”; 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(h); *see also id.* § 2244(b)(3)(C). Mr. Arras relies on § 2255(h)(2), contending that his right to effective assistance of counsel in the context of a lost or forgone plea offer was only recently established *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), and *Missouri v. Frye*, 132 S. Ct. 1399 (2012). We disagree.

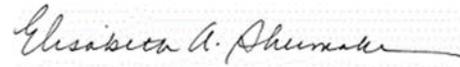
As other circuits have consistently held, *Lafler* and *Frye* applied principles previously recognized in *Strickland v. Washington*, 466 U.S. 668 (1984), and *Hill v. Lockhart*, 474 U.S. 52 (1985), *see Lafler*, 132 S. Ct. at 1384-85; *Frye*, 132 S. Ct. at 1409-10, and thus did not establish a new rule of constitutional law. *See Buenrostro v. United States*, 697 F.3d 1137, 1140 (9th Cir. 2012); *In re King*, 697 F.3d 1189, 1189 (5th Cir. 2012) (per curiam); *Hare v. United States*, 688 F.3d 878, 878-80 (7th Cir. 2012); *In re Perez*, 682 F.3d 930, 932-34 (11th Cir. 2012). Well before *Lafler* and *Frye*, this circuit applied *Strickland* and *Hill* to an ineffective-assistance claim similar to that raised here in *United States v. Carter*, 130 F.3d 1432, 1441-42 (10th Cir. 1997). *See also Lafler*, 132 S. Ct. at 1385 (collecting cases applying *Strickland* to such ineffective-assistance claims). And several years ago we held the application of *Strickland* and *Hill* in this context to be clearly established law for purposes of the deferential review standards in 28 U.S.C. § 2254(d)(1) and (2), *see Williams v. Jones*, 571 F.3d 1086, 1089-90 & n.3 (10th Cir. 2009)—a judgment the Supreme Court later confirmed in *Lafler*, 132 S. Ct. at 1390 (“By failing to apply

Strickland to assess the ineffective-assistance-of-counsel claim respondent raised, the state court’s adjudication was contrary to clearly established federal law.”).

We therefore conclude that authorization is not available to Mr. Arras under § 2255(h)(2). As he does not rely on (nor would his ineffective-assistance claim implicate) the new-evidence provision in § 2255(h)(1), Mr. Arras may not proceed with his proposed second or successive § 2255 motion.

Authorization is DENIED. The 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

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", written in black ink on a light-colored background.

ELISABETH A. SHUMAKER, Clerk