

FILED

United States Court of Appeals  
Tenth Circuit

UNITED STATES COURT OF APPEALS

March 19, 2013

FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker  
Clerk of Court

In re:

DEVIN LEE MELCHER,

Movant.

No. 13-5029  
(D.C. Nos. 4:07-CR-00018-CVE-1 &  
4:09-CV-00714-CVE-TLW)  
(N.D. Okla.)

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**ORDER**

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Before **KELLY, HARTZ, and TYMKOVICH**, Circuit Judges.

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Devin Lee Melcher, a federal prisoner proceeding pro se, moves for authorization to file a second or successive 28 U.S.C. § 2255 motion challenging his drug-trafficking conviction and sentence. We deny authorization.

Melcher's motion cannot proceed in the district court without first being authorized by this court. *See* 28 U.S.C. § 2255(h); *id.* § 2244(b)(3). We may authorize a claim only if the prisoner makes a prima facie showing that the claim 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." *Id.* § 2255(h); *see also id.* § 2244(b)(3)(C).

Pursuant to a plea agreement, Melcher pleaded guilty to conspiracy with intent to distribute marijuana and methamphetamine. *See United States v. Melcher*, 297 F. App'x 813, 814 (10th Cir. 2008) (unpublished). Based on the nature of the offense, his leadership role in the drug conspiracy, his attempts to intimidate witnesses and destroy or conceal evidence, and his lengthy criminal history, the district court sentenced Melcher to life imprisonment. *See id.* at 814-15. He asserts that his trial counsel provided ineffective assistance (1) by guaranteeing that he would not face a life sentence if he pleaded guilty and (2) by failing to investigate and present as mitigating factors at his sentencing Melcher's prior drug use and mental health issues. In his first § 2255 motion, Melcher asserted, and we rejected, similar claims of ineffective assistance of counsel. *See United States v. Melcher*, 378 F. App'x 810, 812-13 (10th Cir. 2010) (unpublished).

Citing the Supreme Court's recent decisions in *Lafler v. Cooper*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1376 (2012), and *Missouri v. Frye*, \_\_\_ U.S. \_\_\_ 132 S. Ct. 1399 (2012), Melcher contends that his proposed claims rely on a "new rule of constitutional law" under § 2255(h). He asserts that the precedents this court relied on in previously rejecting his ineffective-assistance claims are no longer good law after *Lafler* and *Frye*. In those cases the Supreme Court held that the Sixth Amendment right to counsel may be violated when a defendant receives a harsher sentence as a result of his attorney's constitutionally deficient advice to reject a plea bargain, *see Lafler*, 132 S. Ct. at 1383, 1390-91, or as a result of his attorney's failure to inform him of a

plea offer from the government, *see Frye*, 132 S. Ct. at 1404, 1410-11. But neither *Lafler* nor *Frye* announced a new rule of constitutional law. *See Williams v. United States*, 705 F.3d 293, 294 (8th Cir. 2013) (per curiam); *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, 881 (7th Cir. 2012); *In re Perez*, 682 F.3d 930, 933-34 (11th Cir. 2012) (per curiam).

Accordingly, the motion for authorization 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

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

ELISABETH A. SHUMAKER, Clerk