

FILED

United States Court of Appeals  
Tenth Circuit

UNITED STATES COURT OF APPEALS

April 8, 2014

FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker  
Clerk of Court

In re:

ESTEBAN DIAZ,

Movant.

No. 14-6048  
(D.C. Nos. 5:14-CV-00076-M &  
5:07-CR-00094-M-1)  
(W.D. Okla.)

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**ORDER**

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

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Esteban Diaz, a federal prisoner proceeding pro se, seeks authorization to file a second or successive 28 U.S.C. § 2255 motion challenging his 2007 conviction on one count of attempting to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. We deny authorization.

Diaz pled guilty to one count of a four-count indictment and was sentenced to 235 months' imprisonment. We enforced the appeal waiver in his plea agreement and dismissed his appeal. In June 2010, Diaz filed a motion to enforce his plea agreement in the district court. He contended that the government had breached its promise to move for a sentence reduction under Fed. R. Crim. P. 35 based upon Diaz's cooperation. After an evidentiary hearing on July 20, 2011, the district court held that the government had not breached the plea agreement and denied Diaz's motion.

Diaz next filed a pro se § 2255 motion, arguing his guilty plea should be set aside because his attorney provided ineffective assistance of counsel. He claimed his counsel falsely told him, before he pled guilty, that the government had promised to file a Rule 35 motion to reduce his sentence. The district court held that Diaz's counsel's performance was constitutionally deficient, but that Diaz failed to establish that he suffered any prejudice. The court denied his § 2255 motion on July 23, 2012. Diaz appealed and we denied a certificate of appealability.

Diaz filed a second pro se § 2255 motion in January 2014. The district court construed it as an unauthorized second or successive § 2255 motion and transferred it to this court. Diaz now moves this court for authorization to file a second or successive § 2255 motion.

Diaz'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).

Diaz seeks authorization to file two claims. He first contends that the district court violated his Sixth Amendment rights by making factual findings that increased his statutory mandatory minimum sentence. Citing the Supreme Court's decision in *Alleyne v. United States*, 133 S. Ct. 2151 (2013), Diaz asserts that this claim relies on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" under § 2255(h)(2). *Alleyne* overruled prior Supreme Court case law, holding that under the Sixth Amendment

[a]ny fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt. Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an "element" that must be submitted to the jury.

133 S. Ct. at 2155 (citation omitted). But although *Alleyne* set forth "a new rule of constitutional law," its ruling "has not been made retroactive to cases on collateral review by the Supreme Court." *In re Payne*, 733 F.3d 1027, 1029 (10th Cir. 2013) (internal quotation marks omitted).

Second, Diaz seeks to file a claim asserting ineffective assistance by his trial counsel. Diaz alleges that his counsel misrepresented that Diaz's sentence would be a mandatory ten years' imprisonment, based on his guilty plea to attempting to distribute one pound of methamphetamine. He also re-alleges that his counsel falsely promised that the government would move to reduce his sentence under Rule 35.

Diaz first asserts that these ineffective assistance claims rely on "newly discovered evidence" under § 2255(h)(1). He claims that he first discovered this

evidence during a July 23, 2012, evidentiary hearing. But although the district court denied Diaz's first § 2255 motion on that date, there is no indication in the district court's docket that there was an evidentiary hearing on July 23, 2012, during which Diaz could have discovered any evidence.

Rather, once Diaz received a 235-month sentence, he knew that his counsel's alleged representation about a ten-year sentence was false. And he knew when he filed his first § 2255 motion in March 2012, claiming ineffective assistance of counsel, that his counsel had falsely represented the government's promise to file a Rule 35 motion. Moreover, even if Diaz's cited evidence were "newly discovered," it would not "be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of the offense" under § 2255(h)(1).

Diaz also asserts that his ineffective assistance claims rely on "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)(2). He cites the Supreme Court's decisions in *Missouri v. Frye*, 132 S. Ct. 1399 (2012), and *Lafler v. Cooper*, 132 S. Ct. 1376 (2012). *Frye* and *Lafler* held that the Sixth Amendment right to counsel may be violated when defense counsel fails to inform a defendant of a plea offer from the government, *Frye*, 132 S. Ct. at 1404, 1410-11, or when a defendant receives a harsher sentence as a result of his attorney's constitutionally deficient advice to reject a plea bargain, *Lafler*, 132 S. Ct. at 1383, 1390-91. But

“*Frye* and *Lafler* do not satisfy § 2255(h)(2) because they do not establish a new rule of constitutional law.” *In re Graham*, 714 F.3d 1181, 1183 (10th Cir. 2013) (per curiam).

Accordingly, Diaz’s 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 white background.

ELISABETH A. SHUMAKER, Clerk