

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

September 12, 2012

Elisabeth A. Shumaker
Clerk of Court

In re:

PASCUAL VAZQUEZ-VILLA,

Movant.

No. 12-3231
(D.C. Nos. 5:11-CV-04178-SAC &
5:09-CR-40061-SAC-1)
(D. Kan.)

ORDER

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

Pascual Vazquez-Villa, a federal prisoner appearing pro se, seeks authorization to file a second or successive 28 U.S.C. § 2255 motion challenging his conviction. Before a federal prisoner may file a second or successive motion under § 2255, he must first obtain an order from the court of appeals authorizing the district court to consider the motion. 28 U.S.C. §§ 2244(b)(3)(A), 2255(h). We deny authorization.

In 2010, Mr. Vazquez-Villa was found guilty by a jury of one count of conspiring to possess with the intent to distribute 500 grams or more of methamphetamine mixture, one count of possessing with the intent to distribute 500 grams or more of methamphetamine, and eleven counts of unlawfully using a communication facility in furtherance of the conspiracy. The district court sentenced him to twenty-five years' imprisonment. We affirmed his conviction and sentence on direct appeal. *See United States v. Vazquez-Villa*, 423 F. App'x 812, 815 (10th Cir.

2011). In 2011, Mr. Vazquez-Villa filed a 28 U.S.C. § 2255 motion challenging his conviction, arguing that his trial counsel provided ineffective assistance in a number of ways. The district court denied the motion, and we dismissed his appeal from that denial as untimely.

In his present application for authorization to file a second or successive § 2255 motion, Mr. Vazquez-Villa proposes bringing a claim that his trial counsel provided ineffective assistance when advising him to go to trial rather than accept a plea agreement that offered more lenient terms than the sentence he ultimately received after his conviction by jury. To obtain authorization to file a second or successive § 2255 motion, a federal prisoner must demonstrate that his proposed claims either depend on “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,” § 2255(h)(1), or rely on “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,” § 2255(h)(2). Mr. Vazquez-Villa relies on § 2255(h)(2), contending that the Supreme Court announced a new rule of constitutional law in two cases decided by the Supreme Court in March 2012, *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), and *Missouri v. Frye*, 132 S. Ct. 1399 (2012).

In *Lafler* and *Frye*, the Supreme Court reaffirmed the existing constitutional right to effective counsel in the plea bargaining process. *Lafler*, 132 S. Ct. at 1384,

1388 (holding that the standards of *Strickland v. Washington*, 466 U.S. 668 (1984), apply to plea bargaining even where the defendant rejects the plea offer and has received a full and fair trial); *Frye*, 132 S. Ct. at 1409 (holding that, where a plea offer lapses or is rejected because of counsel’s deficient performance, defendant must establish prejudice by showing a reasonable probability that he would have accepted the plea, that the prosecution and trial court would have accepted it, and that “the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.”). We note that the Seventh and Eleventh Circuits have held that *Frye* and *Lafler* did not announce a new rule of constitutional law. See *Hare v. United States*, __ F.3d __, 2012 WL 3156329, at *1-*3 (7th Cir. Aug. 6, 2012); *In re Perez*, 682 F.3d 930, 932-33 (11th Cir. 2012). We need not reach that broader question, however, because “a new rule is not made *retroactive to cases on collateral review* unless the Supreme Court holds it to be retroactive.” *Tyler v. Cain*, 533 U.S. 656, 663 (2001) (emphasis added; internal quotation marks omitted); see also *Bey v. United States*, 399 F.3d 1266, 1268 (10th Cir. 2005) (“[A] new rule is made retroactive to cases on collateral review only when the Supreme Court *explicitly holds* that the rule it announced applies retroactively to such cases.”). The Supreme Court has not so held as to either *Lafler* or *Frye*.

Because Mr. Vazquez-Villa’s proposed claim does not satisfy the requirements of § 2255(h)(2), we DENY his motion for authorization. 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 black ink, reading "Elisabeth A. Shumaker" with a long, sweeping horizontal line extending from the end of the name.

ELISABETH A. SHUMAKER, Clerk