

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

March 25, 2015

Elisabeth A. Shumaker
Clerk of Court

In re:

LOY CHRIS STEVENS,

Movant.

No. 15-6039
(D.C. Nos. 5:02-CV-01764-T &
5:99-CR-00042-T-1)
(W.D. Okla.)

ORDER

Before **LUCERO**, **GORSUCH**, and **McHUGH**, Circuit Judges.

Loy Chris Stevens moves for authorization to file a second or successive 28 U.S.C. § 2255 motion regarding his 1999 convictions for drug and firearm offenses. We deny authorization.

Mr. Stevens relies on 28 U.S.C. § 2255(h)(2), which allows authorization for claims based on “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” For his new law, he relies on *Peugh v. United States*, 133 S. Ct. 2072, 2078 (2013), which holds that “there is an *ex post facto* violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense.” Armed with *Peugh*, Mr. Stevens seeks to pursue claims that sentencing him under the 1998 Sentencing Guidelines violated the Ex Post Facto

Clause and that his counsel was ineffective for failing to object to the use of the 1998 Sentencing Guidelines.

Peugh announced a rule of constitutional law, and perhaps it could be considered to be a *new* rule of constitutional law. See *Herrera-Gomez v. United States*, 755 F.3d 142, 145 (2d Cir. 2014) (per curiam) (“[Petitioner] contends that the Supreme Court announced a new rule of constitutional law in *Peugh*. That may be.”). But we need not decide that issue, because under § 2255(h)(2), the Supreme Court also must make a new rule retroactive to cases on collateral review. “[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). The Supreme Court has not made *Peugh* retroactively applicable to cases on collateral review, see *Herrera-Gomez*, 755 F.3d at 146, and unless and until it does so, *Peugh* does not satisfy § 2255(h)(2).

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 over a light blue horizontal line.

ELISABETH A. SHUMAKER, Clerk