

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

CASE NO. 8:03-cr-332-T-23CPT
8:16-cv-3074-T-23CPT

JOSE RESTREPO

ORDER

Restrepo and his co-defendants were arrested in the Eastern Pacific Ocean while transporting approximately 1100 kilograms of cocaine. Restrepo is imprisoned for 210 months based on his guilty plea to possession with the intent to distribute cocaine. In 2004 Restrepo was sentenced and, based on the appeal waiver in the plea agreement, his subsequent appeal was unsuccessful. Restrepo's earlier motion under 28 U.S.C. § 2255 was denied. (Docs. 268 and 269 in 03-cr-332) Restrepo again moves under Section 2255 and seeks the retroactive application of an amendment to the Sentencing Guidelines. (Doc. 1)

Rule 4, Rules Governing Section 2255 Cases, requires both a preliminary review of the motion to vacate and a summary dismissal "[i]f it plainly appears from the face of the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief" *Accord Wright v. United States*, 624 F.2d

557, 558 (5th Cir. 1980)¹ (finding the summary dismissal of a Section 2255 motion was proper “[b]ecause in this case the record, uncontradicted by [defendant], shows that he is not entitled to relief”); *Hart v. United States*, 565 F.2d 360, 361 (5th Cir. 1978) (“Rule 4(b) [Rules Governing § 2255 Proceedings], allows the district court to summarily dismiss the motion and notify the movant if ‘it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief’”). See *United States v. Deal*, 678 F.2d 1062, 1065 (11th Cir. 1982) (citing *Wright* and *Hart*). Restrepo’s motion is barred.

Restrepo’s earlier challenge to this same conviction was denied on the merits. Restrepo cannot pursue a second or successive motion without authorization from the Eleventh Circuit Court of Appeals. “Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.” 28 U.S.C. § 2244(b)(3)(A). *Felker v. Turpin*, 518 U.S. 651, 664 (1996); *Dunn v. Singletary*, 168 F.3d 440, 442 (11th Cir. 1999). This new action is, therefore, a second or successive action that is subject to specific restrictions because a district court lacks jurisdiction to review a second or successive motion without the requisite authorization from the circuit court. *Burton v. Stewart*, 549 U.S. 147, 157 (2007) (“Burton neither sought nor received authorization from the Court of Appeals before

¹ Unless later superseded by Eleventh Circuit precedent, a Fifth Circuit decision issued before October 1, 1981, binds this court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*).

filing his 2002 petition, a ‘second or successive’ petition challenging his custody, and so the District Court was without jurisdiction to entertain it.”).

Moreover, Restrepo’s motion lacks merit. Restrepo asserts entitlement to the retroactive application of Amendment 794, United States Sentencing Guidelines, which clarifies entitlement to a decrease of the offense level based on the defendant’s role in the offense. The amendment became effective in 2015; Restrepo was sentenced more than fifteen years earlier. Restrepo erroneously asserts entitlement to the retroactive application of Amendment 794 based on *United States v. Quintero-Leyva*, 823 F.3d 519, 523 (9th Cir. 2016), which holds “that [Amendment 794] applies retroactively to direct appeals.” Restrepo is seeking relief on collateral review not on direct appeal. Under Section 1B1.10(a)(2)(A), an amendment to the Sentencing Guidelines is not applied retroactively unless it is listed in Section 1B1.10(d). Amendment 794 is not listed in the latter section and is, therefore, not afforded retroactive effect. As a consequence, Restrepo’s motion lacks merit.

Generally, an applicant cannot appeal a district court’s denial of relief under Section 2255 unless either the district court or the circuit court issues a certificate of appealability (“COA”). However, as *Williams v. Chatman*, 510 F.3d 1290, 1295 (11th Cir. 2007), explains (in the context of an application for the writ of habeas corpus under Section 2254), a COA cannot issue in this action because the district court cannot entertain the motion to vacate to review the second or successive application:

Because he was attempting to relitigate previous claims that challenge the validity of his conviction, Williams was required to move this Court for an order authorizing the district court to consider a successive habeas petition. *See* 28 U.S.C. § 2244(b)(3)(A). Without such authorization, the district court lacked subject matter jurisdiction to consider the successive petition, and therefore could not issue a COA with respect to any of these claims.

See United States v. Robinson, 579 Fed. App'x 739, 741 n.1 (11th Cir. 2014)² (applying *Williams* in determining that the district court lacked jurisdiction because the motion to alter or amend a judgment under Rule 60(b), Federal Rules of Civil Procedure, was actually an impermissible second or successive motion under Section 2255 and, as a consequence, "a COA was not required to appeal the denial of the motion").

Accordingly, the motion to vacate under 28 U.S.C. § 2255 (Doc. 1) is **DISMISSED**. The clerk must close this case and enter a copy of this order in the criminal action.

ORDERED in Tampa, Florida, on February 27, 2018.



STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

² "Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority." 11th Cir. Rule 36-2.