

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2012

(Submitted: March 18, 2013 Decided: March 28, 2013)

Docket No. 13-547

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Robert Gallagher,
Petitioner,

- v. -

United States of America,
Respondent.

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Before: JACOBS, Chief Judge, CABRANES and WESLEY,
 Circuit Judges.

Petitioner Robert Gallagher, pro se, seeks an order authorizing the United States District Court for the Eastern District of New York to consider a second or successive motion filed under 28 U.S.C. § 2255. Because Gallagher has not demonstrated that his proposed motion is based on a new rule of constitutional law made retroactive by the Supreme Court, his request is DENIED.

1 ROBERT GALLAGHER, pro se.

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3 PETER A. NORLING, for Loretta E.
4 Lynch, United States Attorney
5 for the Eastern District of New
6 York, for Respondent.
7

8 PER CURIAM:

9 Petitioner Robert Gallagher, pro se, seeks an order
10 authorizing the United States District Court for the Eastern
11 District of New York to consider a second or successive
12 motion filed under 28 U.S.C. § 2255. Gallagher was
13 convicted of committing violent crimes in aid of
14 racketeering activity, in violation of 18 U.S.C. § 1959;
15 judgment was entered in April 1996; this Court affirmed in
16 1997.

17 In 1999, Gallagher filed a motion under 28 U.S.C. §
18 2241, arguing that his trial counsel was ineffective because
19 counsel underestimated Gallagher's sentencing exposure
20 during plea bargaining. The district court construed the
21 motion as being brought under 28 U.S.C. § 2255, and denied
22 it as untimely.

23 Gallagher filed the instant motion for an order
24 authorizing the district court to consider a second or
25 successive motion on February 12, 2013. He alleges the same
26 facts--that his trial "counsel rendered ineffective

1 assistance during plea negotiations by misrepresenting the
2 exposure faced at trial"--but argues that this motion relies
3 on a "new rule of constitutional law" announced in Lafler v.
4 Cooper, 132 S. Ct. 1376 (2012), and Missouri v. Frye, 132 S.
5 Ct. 1399 (2012).

6 We must dismiss a claim that was presented in a prior
7 motion under § 2255. See 28 U.S.C. § 2244(b)(1) ("A claim
8 presented in a second or successive habeas corpus
9 application under section 2254 that was presented in a prior
10 application shall be dismissed."); Green v. United States,
11 397 F.3d 101, 102 n.1 (2d Cir. 2005) (applying § 2244(b)(1)
12 to motions brought under § 2255). Therefore, to the extent
13 this second motion presents the same claim presented in the
14 first (untimely) § 2255 motion, that claim is dismissed
15 under Green.

16 To the extent this second motion presents a new claim
17 based on Lafler and Frye, that new claim must be dismissed
18 because it is not based on "a new rule of constitutional
19 law, made retroactive to cases on collateral review by the
20 Supreme Court, that was previously unavailable." 28 U.S.C.
21 § 2255(h)(2). Neither Lafler nor Frye announced "a new rule
22 of constitutional law": Both are applications of Strickland

1 v. Washington, 466 U.S. 668 (1984). Moreover, even if
2 Lafler or Frye did announce “a new rule of constitutional
3 law,” it was not “made retroactive to cases on collateral
4 review by the Supreme Court.” Neither case contains any
5 express language as to retroactivity, and we have been
6 unable to locate any subsequent decision giving either of
7 them retroactive effect. See Tyler v. Cain, 533 U.S. 656,
8 663 (2001) (“[A] new rule is not ‘made retroactive to cases
9 on collateral review’ unless the Supreme Court holds it to
10 be retroactive.” (quoting 28 U.S.C. § 2255(h)(2))).

11 For the foregoing reasons, Gallagher’s motion is
12 DENIED.