

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

April 2, 2008

Elisabeth A. Shumaker
Clerk of Court

In re:

RICHARD TANDY SMITH,

Movant.

No. 08-6053

ORDER

Before **BRISCOE, O'BRIEN**, and **TYMKOVICH**, Circuit Judges.

In 1986, John “Woody” Cederlund was robbed of methamphetamine and killed by a shotgun blast to the chest. Richard Tandy Smith and two women were present at the scene. In 1987, based primarily on evidence of blood consistent with Mr. Cederlund’s on the passenger-side door of the car Mr. Smith was using and the testimony of the two women, Mr. Smith was convicted by a jury of first-degree felony murder under Okla. Stat. tit. 21 § 701.7 and was sentenced to death. After unsuccessfully pursuing state post-conviction proceedings, he filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. The federal district court denied the petition. That decision currently is on appeal before this court in appeal No. 05-6206. Mr. Smith now has filed a motion seeking authorization to file a second or successive § 2254 petition.

A petitioner seeking to bring a second or successive § 2254 petition may proceed only with a claim not presented in a prior application that (A) “relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,” or (B) relies on facts that “could not have been discovered previously through the exercise of due diligence” and that “would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.” 28 U.S.C.

§§ 2244(b)(2)(A), (b)(2)(B). Mr. Smith need only make a prima facie showing of the statutory requirements. *Id.* § 2244(b)(3)(C). This court does not “engage in a preliminary merits assessment”; rather, the inquiry is “solely on the conditions specified in § 2244(b) that justify raising a new habeas claim.” *Ochoa v. Sirmons*, 485 F.3d 538, 541 (10th Cir. 2007). A prima facie showing has been defined as a “sufficient showing of possible merit to warrant a fuller exploration by the district court.” *Id.* at 545 (quotation omitted) (discussing *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997)).

Mr. Smith proceeds under § 2244(b)(2)(B), the “new evidence” prong. He points to the results of DNA testing of the blood from the car door that he obtained in the fall of 2005, a few months after the district court’s decision in his first habeas proceeding. According to Mr. Smith, the test results excluded Mr. Cederlund as the source of the blood on the car door. His motion and

proposed second habeas petition show that he wishes to raise the following claims, in light of his new evidence: (1) the failure to disclose material evidence violated his constitutional rights under *Brady v. Maryland*, 373 U.S. 83, 87 (1963); (2) the failure to instruct the jury regarding the corroboration of accomplice witness testimony rendered the trial fundamentally unfair and violated his right not to be deprived of a liberty interest without due process; (3) the failure to instruct the jury regarding the unreliability of informant witness testimony rendered the trial fundamentally unfair; (4) the cumulative effect of the errors denied him his right to a fair trial and the cumulative effect of trial-phase and mitigation-phase errors require a new sentencing proceeding; and (5) he is actually innocent of shooting Mr. Cederlund and thus is incarcerated in violation of his constitutional rights. For several reasons, we conclude that Mr. Smith has failed to make the required prima facie showing that § 2244(b) is satisfied.

First, Mr. Smith raised certain of these claims (the *Brady* claims concerning the failure to produce all statements of the two eyewitnesses, the jury-instruction claims, and the cumulative-error claim) in his first habeas proceeding. Under § 2244(b)(1), “[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.” We have considered Mr. Smith’s arguments that his new evidence alters his claims sufficiently to create new claims for purposes of § 2244(b)(1),

but we do not find his contentions persuasive. The previously-asserted claims cannot proceed.

Second, § 2244(b)(2)(B)(i) requires that “the factual predicate for the claim could not have been discovered previously through the exercise of due diligence.” Mr. Smith’s new evidence is not the “factual predicate” for the claims he wishes to assert, as the new evidence goes toward undermining the blood evidence, while his claims are aimed at undermining the eyewitness testimony. In addition, the opinion of the Oklahoma Court of Criminal Appeals notwithstanding, we are not convinced that Mr. Smith exercised due diligence in obtaining his new evidence. As the government points out, Oklahoma’s DNA-testing program was available to Mr. Smith as early as 2001.

Third, § 2244(b)(2)(B)(ii) requires that “the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.” Mr. Smith’s new evidence does not necessarily exonerate him; in fact, in light of subsequent DNA testing in 2007 that contradicted the 2005 test results, at best it is inconclusive. Even with the new evidence, given the eyewitness testimony a reasonable factfinder could find Mr. Smith guilty. As the Oklahoma Court of Criminal Appeals stated in its opinion denying Mr. Smith’s third state application for post-conviction relief:

It is true that blood spatter was detected on the door to Petitioner's car, and that the State presented expert testimony as to how that blood spatter might have occurred, given the State's theory as to how and where Cederlund was killed. However, the actual source of the blood spatter was, under these facts, immaterial. The fact that Cederlund was murdered by a shotgun blast to the chest, while he stood near Petitioner's car in rural Canadian County on July 21, 1986, was never disputed; the only material dispute was over who the perpetrator was. After initially disclaiming any knowledge of the murder, Petitioner changed his story and claimed that one of the two women who had ridden with him shot Cederlund with the shotgun, which she (according to Petitioner) obtained from the trunk of Petitioner's car. Thus, the source of the blood on Petitioner's car door (or, in fact, whether the substance was human blood at all) was not outcome determinative. What was outcome determinative, in our view, was the testimony of two eyewitnesses to the murder, further corroborated by Petitioner's possession of shotgun shells that matched the one that killed Cederlund. Removing the blood-spatter evidence from consideration, and viewing the remaining evidence as a whole, a reasonable juror could still have concluded that the eyewitness testimony was credible and corroborated, and that Petitioner, not one of his female companions, murdered the victim.

Smith v. State, No. PCD-2005-1154, at 4-5 (Okla. Crim. App. Feb. 28, 2007)

(footnotes and citations omitted).

Moreover, the statute requires a petitioner to tie his new evidence to a constitutional error. As stated above, some of the errors Mr. Smith seeks to assert (the *Brady* claims about the materials concerning the eyewitnesses, the jury-instruction claims, and a claim of cumulative error) are barred under § 2244(b)(1). Further, it appears that some of these errors are not of constitutional magnitude. *See Foster v. Ward*, 182 F.3d 1177, 1193 (10th Cir. 1999) (noting that there is no constitutional requirement for corroboration of

accomplice testimony); *Smith v. Gibson*, 197 F.3d 454, 460 (10th Cir. 1999) (noting that there is no constitutional right to an instruction regarding informant testimony). Of the claims that arguably were not previously asserted, a claim of actual innocence cannot, standing alone, justify a writ of habeas corpus, *Herrera v. Collins*, 506 U.S. 390, 400 (1993), and the *Brady* claims concerning the non-disclosure of statements by persons other than the eyewitnesses and of the results of luminal testing of Mr. Smith's clothes do not satisfy § 2244(b)(2)(B)(i) and (ii). There has been no showing of due diligence with regard to these additional *Brady* claims or that, but for such alleged *Brady* errors, no reasonable factfinder would have found Mr. Smith guilty of felony murder.

Mr. Smith's motion for authorization to file a second or successive § 2254 petition is DENIED. This denial of authorization is not 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", followed by a horizontal flourish line.

ELISABETH A. SHUMAKER, Clerk