

July 29, 2010

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUITElisabeth A. Shumaker
Clerk of Court

In re:

DAVID J. NEWTON,

Movant.

No. 10-5092

ORDER

Before **KELLY**, **EBEL**, and **HARTZ**, Circuit Judges.

David J. Newton seeks authorization to file a second or successive 28 U.S.C. § 2254 petition. Because Mr. Newton cannot meet the requisite conditions under 28 U.S.C. § 2244, we deny authorization and dismiss the proceeding.

Mr. Newton was convicted in 2004 of first degree rape and was sentenced to 400 years in prison. His conviction and sentence were affirmed on direct appeal. In February 2006, he filed his first § 2254 habeas petition, which was denied by the district court. Mr. Newton sought to appeal from the district court's decision, but we denied his request for a certificate of appealability and dismissed his appeal. *See Newton v. Dinwiddie*, 342 F. App'x 421, 422 (10th Cir. 2009). Mr. Newton now seeks authorization to file a second or successive § 2254 petition.

In order to be entitled to authorization, Mr. Newton must show that:

(A) . . . the claim 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)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) 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.

28 U.S.C. § 2244(b)(2).

Mr. Newton seeks to raise three new claims for relief. For his first claim, he contends that his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness when trial counsel failed to utilize potential impeachment evidence. Mr. Newton asserts that this claim relies on newly discovered evidence, which he identifies as statements from the victim that were wrongfully excluded by his own trial counsel. But all of these facts were available to Mr. Newton after the conclusion of his direct appeal and before he filed his first habeas action. Because he could have discovered the factual predicate for this claim before he filed his first habeas petition, he cannot meet the condition in § 2244(b)(2)(B)(i).

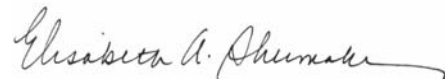
Moreover, Mr. Newton cannot meet the conditions in § 2244(b)(2)(B)(ii) because the facts in this claim do not establish that he is actually innocent of the crime for which he was convicted. *See Calderon v. Thompson*, 523 U.S. 538, 558

(1998) (“a federal court can consider a claim presented in a second or successive application only if the prisoner shows, among other things, that the facts underlying the claim establish his innocence by clear and convincing evidence.”). Mr. Newton is therefore not entitled to authorization on his first claim.

As for his second and third claims, he admits in his motion that they do not rely on a new rule of constitutional law or newly discovered evidence. *See* Mot. at 6-7. He is therefore not entitled to authorization on his second or third claims.

Because Mr. Floyd has failed to meet the conditions in § 2244(b)(2), we DENY authorization to file a second or successive § 2254 habeas petition, and DISMISS this matter. 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".

ELISABETH A. SHUMAKER, Clerk