

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

November 26, 2013

Elisabeth A. Shumaker
Clerk of Court

In re:

KEITH ELMO DAVIS,

Movant.

No. 13-7076
(D.C. No. 6:08-CV-00235-JHP-KEW)
(E.D. Okla.)

ORDER

Before **LUCERO**, **MATHESON**, and **BACHARACH**, Circuit Judges.

Keith Elmo Davis, proceeding pro se, seeks authorization to file a second or successive 28 U.S.C. § 2254 habeas petition. We deny authorization.

After a jury trial in Oklahoma state court, Mr. Davis was found guilty of forcible sodomy and lewd or indecent proposal to a child under sixteen. He was sentenced to consecutive sentences of twenty and fifteen years. His convictions and sentences were affirmed on direct appeal. He then filed a § 2254 habeas petition. The district court denied the petition. We dismissed his request for a certificate of appealability because it was not timely filed. *See Davis v. Jones*, 421 F. App'x 829, 830 (10th Cir. 2011).

Mr. Davis now seeks authorization to file a second or successive § 2254 habeas petition. In order to obtain authorization, Mr. Davis must show that his 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 that “the factual

predicate for the claim could not have been discovered previously through the exercise of due diligence” and 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.” 28 U.S.C. § 2244(b)(2).

Mr. Davis asserts that he has newly discovered evidence to support a new habeas claim that he “was denied ‘conflict free’ representation of both trial and appellate counsel in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.” Mot. for Auth. at 6. He contends that he was previously unaware that his attorney was simultaneously representing him and the former Latimer County Sheriff, Melvin Holly. Mr. Holly was apparently involved with the search of Mr. Davis’ home after his arrest.

Mr. Davis fails to show, however, why he could not have discovered this information before he filed his first habeas petition. And, more importantly, this new evidence does not “establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense.” See 28 U.S.C. § 2244(b)(2)(B)(ii). Mr. Davis’ victim testified at trial that Mr. Davis performed oral sodomy on him. Any alleged conflict due to counsel representing Mr. Davis and Mr. Holly simultaneously does not demonstrate that Mr. Davis did not commit the crimes for which he was convicted.

Because Mr. Davis has failed to meet the standard for authorization in § 2244(b)(2), we deny his motion. 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.” *Id.* § 2244(b)(3)(E). Mr. Davis’ motion to proceed in forma pauperis is denied as unnecessary.

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", written in black ink on a light blue dotted background.

ELISABETH A. SHUMAKER, Clerk