

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

October 5, 2016

Elisabeth A. Shumaker
Clerk of Court

In re: JIMMY GLENN HENDRIX,

Movant.

No. 16-5151
(D.C. No. 4:10-CV-00600-CVE-TLW)
(N.D. Okla.)

ORDER

Before **KELLY, GORSUCH**, and **HOLMES**, Circuit Judges.

Jimmy Glenn Hendrix, an Oklahoma state prisoner proceeding pro se, seeks authorization to file a second or successive 28 U.S.C. § 2254 habeas petition. For the following reasons, we deny authorization.

Mr. Hendrix was convicted of first-degree murder and possession of a firearm by a convicted felon. He was sentenced to life imprisonment on the murder conviction, and 30 years' imprisonment on the firearm charge, to be served consecutively. The Oklahoma Court of Criminal Appeals affirmed the convictions and sentences on direct appeal.

Mr. Hendrix subsequently filed a § 2254 habeas petition. The district court denied relief and we denied a certificate of appealability (COA). *See Hendrix v. Trammell*, 576 F. App'x 767, 768 (10th Cir. 2014). He now seeks authorization to file a second or successive § 2254 habeas petition.

We may authorize the filing of a successive claim only if the prisoner makes a prima facie showing that his claim satisfies the requirements for authorization. See 28 U.S.C. § 2244(b)(3)(C). To make such a showing, the prisoner's proposed claim must rely on (1) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or (2) facts that "could not have been discovered previously through the exercise of due diligence," and that "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." *Id.* § 2244(b)(2).

We provided the factual background related to the murder in our decision denying a COA:

In early March 2008 Mr. Hendrix spent a night drinking beer and smoking methamphetamine and then spent the next afternoon and evening driving around, drinking more beer, and smoking more methamphetamine with three acquaintances (Derek Long, Jeffrey Smith, and his wife, Ashley Smith). At 11:00 p.m. they met the victim, Jerrod Young, in Tulsa, Oklahoma, for a drug deal. Young offered them cocaine and Mr. Hendrix snorted some. Shortly thereafter he and Young fought in the parking lot and he fatally shot Young in the back.

Hendrix, 576 F. App'x at 768.

Mr. Long testified against Mr. Hendrix at trial. In his motion for authorization, Mr. Hendrix seeks to bring a claim asserting a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). He contends that the district attorney knowingly let Mr. Long commit perjury when Mr. Long testified that he did not have a deal for favorable treatment in exchange for his testimony, when in fact he did.

Mr. Hendrix argues that he has new evidence entitling him to authorization. He asserts that another inmate, Nathan Jerome Tilley, came to him and told him that Mr. Long confessed to Mr. Tilley that he had a deal in place for leniency at the time he testified against Mr. Hendrix. Although Mr. Hendrix claims that he has an affidavit from Mr. Tilley testifying to these allegations, he has not attached any such evidence to support his motion for authorization.

Even assuming that such an affidavit exists, however, it would not be sufficient to entitle Mr. Hendrix to authorization. If Mr. Long did have an agreement for leniency in place, but testified that no such agreement existed, such evidence could only be used to impeach his credibility. And the Supreme Court has explained that impeachment evidence that goes to the credibility of a witness, including the existence of a grant of immunity from the prosecutor, “will seldom, if ever, make a clear and convincing showing that no reasonable juror would have believed the heart of [the witness’s] account of [the defendant’s] actions.” *Sawyer v. Whitley*, 505 U.S. 333, 349 (1992).

Mr. Hendrix has failed to make a *prima facie* showing that his new evidence “would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense,” 28 U.S.C. §2244(b)(2)(B)(ii). Accordingly, we deny his motion for

authorization. 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).

Entered for the Court

A handwritten signature in black ink, reading "Elisabeth A. Shumaker". The signature is written in a cursive style with a long, sweeping horizontal line at the end.

ELISABETH A. SHUMAKER, Clerk