

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

October 20, 2016

Elisabeth A. Shumaker
Clerk of Court

In re: MAJOR HUDSON, III,

Movant.

No. 16-6270
(D.C. No. 5:01-CV-00258-W)
(W.D. Okla.)

ORDER

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

Major Hudson, III, proceeding pro se, seeks authorization to file a second or successive habeas application under 28 U.S.C. § 2254 challenging his 1998 conviction in Oklahoma state court on charges of first degree rape, first degree burglary, child abuse, and threatening a witness. For the following reasons, we deny authorization.

Hudson filed his first § 2254 application in 2001. The district court denied relief, and this court denied a certificate of appealability.

We may authorize a second or successive claim only if Hudson has not raised it in a previous § 2254 habeas application. See 28 U.S.C. § 2244(b)(1). And we may not authorize a new claim unless it satisfies one or both of the requirements specified in § 2244(b)(2). A new 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) a factual predicate 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)(A)-(B). Hudson must make a prima facie showing that he can satisfy these gate-keeping requirements. *See Case v. Hatch*, 731 F.3d 1015, 1028 (10th Cir. 2013).

Hudson presents three proposed claims in his motion for authorization: (1) the police department destroyed evidence in 2008 and 2011, specifically a rape kit, depriving Hudson of due process; (2) the state withheld critical exculpatory evidence at the time of Hudson’s trial, specifically the test results from a rape kit, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and (3) if the state did not violate *Brady*, Hudson’s trial counsel provided ineffective assistance by failing to consult with Hudson regarding the rape-kit test results.

Hudson argues that his claims are predicated on a new rule of law—a recently enacted Oklahoma statute related to post-conviction DNA testing—which he says applies retroactively. *See* Postconviction DNA Act, Okla. Stat. tit. 22, §§ 1373-1373.7 (2013). But a second or successive § 2254 application must rely on “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” 28 U.S.C. § 2244(b)(2)(A). Hudson does not attempt to demonstrate that the United States Supreme Court has made any new rule of constitutional law related to Oklahoma’s Postconviction DNA Act applicable to cases on collateral review. *See Tyler v. Cain*, 533 U.S. 656, 662 (2001) (noting that this “requirement is satisfied only if *this Court* has held that the new rule is retroactively

applicable to cases on collateral review.” (emphasis added)). Hudson therefore fails to satisfy the gatekeeping requirement in § 2244(b)(2)(A).

Hudson likewise fails to satisfy the gatekeeping requirement in § 2244(b)(2)(B). Accordingly, we deny Hudson’s 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.” 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