

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

July 12, 2017

Elisabeth A. Shumaker
Clerk of Court

In re: SHAVIS D. WRIGHT,

Movant.

No. 17-2075
(D.C. No. 1:17-CV-00519-MV-GJF)
(D. N.M.)

ORDER

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

Shavis D. Wright, a New Mexico state prisoner, requests authorization to file a second or successive habeas corpus petition relating to his 2003 conviction on five counts of armed robbery by a habitual offender. While the procedural background underlying his request is somewhat complicated, resolution of the request is not. Mr. Wright cites newly discovered evidence as the basis for authorization, but for reasons explained below he cannot satisfy the applicable requirements under 28 U.S.C. § 2244(b)(2)(B). We therefore deny authorization.

After pleading no contest to the armed robbery charges, Mr. Wright was sentenced to imprisonment for a total of 38 years, with 16 years suspended. Although that would appear to entail 22 years' incarceration, his original judgment and commitment (J&C) commanded the department of corrections to confine him for a term of only 16 years. After the discrepancy came to light years later, the state trial judge amended the J&C to reflect a term of 22 years.

Mr. Wright eventually filed a federal habeas petition alleging that amendment of the J&C violated promises given him by his counsel and the prosecuting attorney that he would serve no more than 16 years in prison. As a result, he claimed that his plea had been unlawfully induced and/or not knowingly made, that his plea rested on promises that had been breached, and that his counsel rendered ineffective assistance in connection with his plea. That petition was denied with prejudice in an order from which Mr. Wright did not take an appeal. A second habeas petition was later dismissed for lack of the requisite circuit authorization under § 2244(b).

Mr. Wright recently filed another habeas petition relating to events surrounding the amendment of his J&C. Because this filing indicated an intent to secure the necessary circuit authorization, the district court transferred it to this court, and Mr. Wright followed up with an associated motion for authorization. These are the materials we now consider.

The primary allegation discussed in Mr. Wright's motion for authorization is that the trial judge responsible for the original and amended J&Cs harbored an undisclosed bias against homosexuals and that this bias played a role in the judge's actions. He claims he only recently discovered this bias and consequently seeks authorization on the basis of newly discovered facts. Under the governing statute such facts must not only be new, they must undercut the defendant's *guilt of the offenses of conviction*, i.e., they must, "if proven and viewed in light of the evidence as a whole, . . . 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[s]*,"

28 U.S.C. § 2244(b)(2)(B)(ii) (emphasis added). Even if there were evidence of bias on the trial judge's part, that would not establish Mr. Wright's innocence of the charges to which he pled. For the same reason, any other challenges he may be attempting to assert against his amended sentence in his proposed habeas petition fall categorically outside the scope of § 2244(b)(2)(B). *See In re Jones*, 137 F.3d 1271, 1274 (11th Cir. 1998) (sentencing challenges are not cognizable under § 2244(b)(2)(B) in light of its exclusive focus on guilt of the underlying offense). Although in his materials Mr. Wright also refers in passing to reliance on new rules of constitutional law, he does not actually identify any rule of constitutional law recognized after his prior pursuit of habeas relief, much less a new rule "made retroactive to cases on collateral review by the Supreme Court," as required to satisfy § 2244(b)(2)(A).

At some points, it appears Mr. Wright may be seeking to reassert a challenge to his plea—and hence potentially his conviction—based on the unfulfilled promises as to sentence that allegedly induced it. The relevant facts in that regard, however, were known before he filed his first habeas petition. Moreover, his unsuccessful pursuit of challenges to his plea in that petition would foreclose authorization for any repetitions claims 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."). *See also* 28 U.S.C. § 2244(b)(2) (indicating that only "[a] claim . . . not presented in a prior application" may be considered for authorization under standards in § 2244(b)(2)(A) and (B)).

Mr. Wright also complains briefly about his retention of an attorney in 2015 who allegedly took over \$20,000 in payment without rendering any services. Whatever the merit of these allegations, they do not provide a basis for authorizing his second or successive habeas petition.

The motion for authorization is denied. 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