

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

June 1, 2017

Elisabeth A. Shumaker
Clerk of Court

In re: ONG VUE,

Movant.

No. 17-6124
(D.C. No. 5:16-CV-00926-HE)
(W.D. Okla.)

ORDER

Before **LUCERO, HARTZ, and O'BRIEN**, Circuit Judges.

Ong Vue, an Oklahoma prisoner proceeding without the assistance of counsel, seeks authorization to file a second or successive 28 U.S.C. § 2254 application. We deny authorization.

Mr. Vue pleaded nolo contendere to and was convicted of one count of first-degree murder and two counts of shooting with intent to kill. He was sentenced to life in prison for the murder conviction and two concurrent 20-year terms for the other convictions. It does not appear that he pursued a direct appeal in Oklahoma. He brought his initial § 2254 application in 2016, seeking relief from an immigration removal order and raising claims of ineffective assistance of counsel. The district court dismissed the application as time-barred and for lack of exhaustion. This court denied a certificate of appealability. Mr. Vue now seeks authorization to bring a successive § 2254 claim based on ineffective assistance of counsel.

To obtain authorization, Mr. Vue's proposed § 2254 application 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." 28 U.S.C. § 2244(b)(2). Mr. Vue must make a *prima facie* showing that he can satisfy one of these gate-keeping requirements. *See id.* § 2244(b)(3)(C).

In his motion, Mr. Vue raises a number of arguments based on flaws in his convictions or in his initial habeas proceeding. For example, he contends his plea of *nolo contendere* was coerced and he is factually innocent. But none of his arguments touch on a new rule of constitutional law or newly discovered evidence. The closest he comes is arguing that an Oklahoma uniform jury instruction constitutes "a new procedural rule" applied retroactively by the Oklahoma Court of Criminal Appeals. Mot. at 30. A new rule of constitutional law, however, must be "made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2244(b)(2). A state-level procedural change is therefore an insufficient basis for authorization, irrespective of its retroactivity.

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 long horizontal flourish.

ELISABETH A. SHUMAKER, Clerk