

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

January 23, 2018

Elisabeth A. Shumaker
Clerk of Court

In re: ANTIONE DIRAY JOHNSON,

Movant.

No. 17-6256
(D.C. No. 5:14-CV-01263-C)
(W.D. Okla.)

ORDER

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

Antione Diray Johnson, an Oklahoma state prisoner proceeding pro se, moves for authorization to file a second or successive 28 U.S.C. § 2254 petition challenging his armed robbery convictions. We deny authorization.

The district court denied Mr. Johnson's previous § 2254 petition, and we denied his application for a certificate of appealability (COA) to appeal from that denial. *Johnson v. Patton*, 634 F. App'x 653, 655 (10th Cir. 2015). He then filed another § 2254 petition, which the district court dismissed for lack of jurisdiction because it was successive and had not been authorized by this court under 28 U.S.C. § 2244(b)(3). He appealed from that dismissal, and we denied his request for a COA. Order Denying COA, *Johnson v. Patton*, No. 17-6158 (10th Cir. Oct. 11, 2017).

Mr. Johnson's habeas application cannot proceed in the district court without first being authorized by this court. See 28 U.S.C. § 2244(b)(3). We may authorize a claim only if the prisoner has not raised it in a previous § 2254 habeas application. See *id.*

§ 2244(b)(1). 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 (1) “on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,” or (2) on facts that “could not have been discovered previously through the exercise of due diligence” and that “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).

Mr. Johnson seeks to raise two claims. First, he argues that the State of Oklahoma suppressed material evidence favorable to him in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). He cites the state’s failure to present testimony at trial from police officers who he says should have testified concerning an allegedly illegal arrest at his home, and he also complains of the lack of a probable cause affidavit to support his arrest. To the extent this represents a new claim, *see Johnson*, 634 F. App’x at 658-59 (denying COA on claim that Mr. Johnson was arrested without probable cause in his home), Mr. Johnson has shown no grounds for authorization. He admits that the claim is not based on a new rule of constitutional law, and he fails to show that it is based on facts that he could not have discovered previously through the exercise of due diligence, which would have established that he was not guilty of the underlying offense.

In his second claim, Mr. Johnson asserts that a detective falsely testified at his trial that Mr. Johnson “was asked to come down to the police station by involved officers

from his home.” Mot. at 9. He admits that this claim is based neither on a new rule of law, nor newly discovered evidence. *See id.* at 10.

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 line.

ELISABETH A. SHUMAKER, Clerk