

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

May 10, 2019

Elisabeth A. Shumaker
Clerk of Court

In re: LYLE C. SANDERS,

Movant.

No. 19-3076
(D.C. No. 5:98-CV-03404-DES)
(D. Kan.)

ORDER

Before **LUCERO, EID**, and **CARSON**, Circuit Judges.

Lyle C. Sanders seeks authorization to file a second or successive 28 U.S.C. § 2254 habeas petition. For the following reasons, we deny authorization.

In 1994, Mr. Sanders was convicted in Kansas state court of first-degree murder. His conviction was reversed on direct appeal because the district court erred in not giving the jury an instruction on the lesser-included offense of second-degree murder. In 1996, after a second trial, Mr. Sanders was again convicted of the same charge. His conviction was affirmed on direct appeal and his attempts at obtaining state post-conviction relief were unsuccessful. He then filed a § 2254 habeas petition. The district court denied the petition and we denied Mr. Sanders' request for a certificate of appealability.

Mr. Sanders has twice before requested authorization to file a second or successive § 2254 habeas petition in 2006 and 2008. Both of those requests were denied. In his latest motion, he seeks authorization to raise three new claims. To obtain authorization, Mr. Sanders must show that each of his claims either "relies 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); or that “the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and . . . the facts underlying the claim, 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 [him] guilty of the underlying offense,” *id.* § 2244(b)(2)(B).

For his first new claim, Mr. Sanders asserts that the state court violated his equal protection and due process rights by allowing DNA test results into evidence when there was insufficient foundation for the reliability of the methods used to calculate the results. For his second new claim, he asserts that his conviction was obtained by perjured testimony in violation of his constitutional rights. But all of the information that Mr. Sanders relies on to support these claims appears to be from the pre-trial processing of his DNA sample in 1993 and testimony at his trials in 1994 and 1996. This information was therefore available to him when he filed his first § 2254 habeas petition in 1998. He fails to show how “the factual predicate for the claim could not have been discovered previously through the exercise of due diligence,” *id.* § 2244(b)(2)(B)(i).¹

For his third new claim, Mr. Sanders asserts that the state violated his constitutional rights by failing to disclose evidence that would have destroyed the credibility of two critical prosecution witnesses. He contends this claim relies on a new

¹ Mr. Sanders concedes these claims do not rely on a new rule of constitutional law that would entitle him to authorization under § 2244(b)(2)(A). *See* Mot. for Auth. at 9, 10.

rule of law and cites to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir. 1995). But that case does not involve a *new* rule of constitutional law as required by § 2244(b)(2)(A) because it was issued almost twenty-five years ago and was available to Mr. Sanders when he filed his first § 2254 petition in 1998. He also asserts that this claim relies on new evidence. For his newly discovered evidence, he states: “Daubert replaced the Frye standard regarding admitting DNA evidence into a courtroom when the scientific protocol has not been established. In the instant case all of the scientific techniques were flawed.” Mot. for Auth. at 11. A legal decision is not new evidence. Mr. Sanders has not presented any newly discovered evidence that would be sufficient to establish that no reasonable factfinder would have found him guilty of the underlying offense as required by § 2244(b)(2)(B).

Because Mr. Sanders has failed to meet the standards for authorization in 28 U.S.C. § 2244(b), we deny his motion. 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). We note that this is the third motion Mr. Sanders has filed seeking authorization for claims that clearly did not meet the standards for authorization in § 2244(b). We therefore warn Mr. Sanders that further attempts to obtain authorization without meeting the requirements in § 2244(b) could result in sanctions.

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a long horizontal flourish.

ELISABETH A. SHUMAKER, Clerk