

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

January 24, 2020

Christopher M. Wolpert
Clerk of Court

In re: DERRICK R. PARKHURST,

Movant.

No. 19-8084
(D.C. No. 2:12-CV-00066-ABJ)
(D. Wyo.)

ORDER

Before **TYMKOVICH**, Chief Judge, **MORITZ** and **CARSON**, Circuit Judges.

Derrick R. Parkhurst, a Wyoming state prisoner proceeding pro se, moves for authorization to file a second or successive 28 U.S.C. § 2254 habeas petition. We deny authorization.

A jury convicted Mr. Parkhurst of first degree murder and assault with a deadly weapon, and he was sentenced to life in prison. The Supreme Court of Wyoming affirmed his conviction on direct appeal. *Parkhurst v. State*, 628 P.2d 1369, 1382 (Wyo. 1981). He has since filed numerous unsuccessful post-conviction challenges in state and federal court. Relevant here, in 1994, he filed his first § 2254 habeas petition. The district court denied the petition due to state procedural default, and we affirmed in *Parkhurst v. Shillinger*, 128 F.3d 1366, 1367 (10th Cir. 1997). Mr. Parkhurst filed a second § 2254 petition in 2012. After concluding that the disposition of his first § 2254 petition was on the merits, the district court dismissed his second petition as

unauthorized. We denied a certificate of appealability and dismissed his appeal of the district court's order.

Mr. Parkhurst now seeks authorization to bring two claims of ineffective assistance of counsel. The first claim is that his defense counsel had a conflict of interest because he had been threatened by Mr. Parkhurst's father and thus feared for his safety. The second claim is that his defense counsel should have objected to the district court's failure to instruct the jury that a killing done out of terror and fear constitutes manslaughter, not first degree murder.

This court must authorize a second or successive § 2254 application before it can be filed in the district court. 28 U.S.C. § 2244(b)(3)(A). Mr. Parkhurst proceeds under § 2244(b)(2)(A), which requires him to show that his claims rely on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." He cites *Trevino v. Thaler*, 569 U.S. 413 (2013), and states that it is "[a] new rule interpreting the 'cause and prejudice' standard." Mot. at 24.

In *Trevino*, the defendant raised a claim of ineffective assistance of counsel for the first time in his federal habeas petition. 569 U.S. at 419. The district court gave the defendant the opportunity to go back to state court and present the claim, but the state court held that it was procedurally defaulted. *Id.* The Fifth Circuit affirmed the district court's decision that the procedural default precluded federal habeas relief. *Id.* at 420. The Supreme Court vacated the Fifth Circuit's decision and remanded, holding that if a "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a

claim of ineffective assistance of trial counsel on direct appeal,” then the exception announced in *Martinez v. Ryan*, 566 U.S. 1, 17 (2012), applies. *Trevino*, 569 U.S. at 429. Under that exception, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of counsel. *Martinez*, 566 U.S. at 17.

Mr. Parkhurst has not established that *Trevino* is a new rule of constitutional law. Indeed, several circuit courts have held that *Trevino* does *not* establish a new rule of constitutional law. *See, e.g., Clark v. Davis*, 850 F.3d 770, 784 (5th Cir. 2017); *Moreland v. Robinson*, 813 F.3d 315, 326 (6th Cir. 2016); *Págan-San Miguel v. United States*, 736 F.3d 44, 45-46 (1st Cir. 2013). Because Mr. Parkhurst has not met the standard for authorization in § 2244(b)(2)(A), 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).

Entered for the Court

A handwritten signature in black ink, appearing to read 'Christopher M. Wolpert', with a long horizontal stroke extending to the right.

CHRISTOPHER M. WOLPERT, Clerk