

FILED

United States Court of Appeals  
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

July 2, 2020

Christopher M. Wolpert  
Clerk of Court

In re: DELMART E.J.M. VREELAND, II,

Movant.

No. 20-1200  
(D.C. No. 1:14-CV-02175-PAB)  
(D. Colo.)

ORDER

Before **TYMKOVICH**, Chief Judge, **LUCERO** and **PHILLIPS**, Circuit Judges.

Delmart E.J.M. Vreeland, II, a Colorado state prisoner proceeding pro se, moves for authorization to file a second or successive 28 U.S.C. § 2254 habeas application. We deny the motion for authorization.

BACKGROUND

Vreeland seeks authorization to file a second or successive § 2254 application to challenge his convictions on numerous counts including inducement and solicitation of child prostitution, sexual exploitation of a child, sexual assault, distribution of a controlled substance, contributing to the delinquency of a minor, and being a habitual criminal. He filed a first § 2254 application in August 2014, raising numerous claims. The district court denied relief. After issuing a certificate of appealability (COA) on one claim, this court affirmed the district court's decision. *See Vreeland v. Zupan*, 906 F.3d 866, 870, 883 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 1586 (2019).

## DISCUSSION

Vreeland's second or successive habeas application cannot proceed in the district court without first being authorized by this court. *See* 28 U.S.C. § 2244(b)(3). In particular, we must determine whether “the application makes a prima facie showing that [it] satisfies the requirements of” subsection (b). *See* § 2244(b)(3)(C). We may authorize a claim only if the prisoner has not raised it in a previous § 2254 habeas application. *See* § 2244(b)(1). And 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 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) a factual predicate 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.” *Id.* § 2244(b)(2)(A)-(B).

Vreeland must make a prima facie showing that he can satisfy these gate-keeping requirements. *See Case v. Hatch*, 731 F.3d 1015, 1028 (10th Cir. 2013). “If in light of the documents submitted with the application it appears reasonably likely that the application satisfies the stringent requirements for the filing of a second or successive petition, we shall grant the application.” *Id.* (internal quotation marks omitted).

Vreeland contends that 31 proposed claims, some with multiple subparts, satisfy the requirements for authorization under § 2244(b)(2)(B) because they rely on newly

discovered evidence. He also asserts that one claim satisfies the requirements of § 2244(b)(2)(A) because it relies on a new rule of constitutional law.

### **Claims 4-29**

Vreeland's proposed Claims 4-29 were all presented in his first § 2254 application. In fact, his proposed second or successive § 2254 application restates the substance of most of these claims in the same or substantially the same language he used in the initial version of his first § 2254 application.<sup>1</sup> Vreeland therefore fails to make a prima facie showing that these claims were not raised in a prior application, as required by § 2244(b)(1). Thus, Claims 4-29 provide no basis for granting Vreeland authorization to file a second or successive § 2254 application.

### **Claim 1**

In his proposed Claim 1, Vreeland asserts that a newly discovered jury verdict form indicates that the jury found him not guilty on the charge of sexual assault force/violence, but the trial court still entered a judgment of guilty on that charge. He claims that he did not learn this fact earlier because the jury verdict forms in his case were suppressed and hidden from him until the trial judge retired in 2018. He has not submitted a copy of the alleged newly discovered verdict form.

Claim 1 does not satisfy the requirements of § 2244(b)(2)(B)(i). First, Vreeland does not make a prima facie showing that the verdict form for the forcible sexual assault

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<sup>1</sup> The district court ordered Vreeland to amend his first § 2254 application to comply with Federal Rule of Civil Procedure 8. Vreeland then filed a shorter, amended application, which he said raised the same issues as his original filing.

charge is newly discovered. He referenced a portion of that verdict form in his original § 2254 application, in arguing that the jury's interrogatory response showed that it affirmatively rejected the State's allegation that he had used force. Second, even if he recently discovered the portion of the jury verdict form that is relevant to this claim, he fails to show that it, like the part of the same verdict form he had in 2014, could not have been discovered previously with the exercise of due diligence.

### **Claim 2**

In his proposed Claim 2, Vreeland alleges that the State withheld or suppressed the complete trial record in his direct appeal, his state post-conviction proceeding, and his first § 2254 habeas proceeding. He claims that he discovered the discrepancies between the different records produced by the State when he received a copy of the entire state court record sometime in 2018. Vreeland does not assert that the State's failure to produce a complete record in previous proceedings was intentional, but he contends that it prevented his valid claims from being addressed on the merits and caused attorneys and courts to believe that his claims were not exhausted, depriving him of a complete appeal and post-conviction and federal habeas proceedings.

Claim 2 does not satisfy § 2244(b)(2)(B)(ii). That subparagraph "requires the '*facts underlying the claim*' to 'establish' a petitioner's innocence, and requires those facts to be attributable to some 'constitutional error' in the underlying trial proceedings." *Case*, 731 F.3d at 1035. The only newly discovered fact underlying Claim 2 is that the State had not previously provided Vreeland with a full state court record. And Vreeland does not allege any constitutional violation. Thus, Vreeland has not made a prima facie

showing that his newly discovered fact, “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 any of the offenses with which he was charged, § 2244(b)(2)(B)(ii).

### **Claim 3(A)**

Vreeland appears to assert that his proposed Claim 3(A), alleging a violation of his Sixth-Amendment right to counsel, is a new claim as required by § 2244(b)(1) because it is based on newly discovered evidence. This court affirmed the district court’s denial of Vreeland’s Sixth-Amendment claim raised in his first § 2254 application, in which he contended that he had not “impliedly waived his right to counsel by threatening counsel, filing meritless motions, and firing counsel as the date of trial approached.” *Vreeland*, 906 F.3d at 873 (internal quotation marks omitted). Vreeland now maintains that he recently discovered illegal recordings of telephone calls between him and his counsel. He claims that the substance of these conversations supports his contention that he never created a conflict with or fired his counsel. His proposed Claim 3(A) is therefore the same as the claim he presented in his first § 2254 application.

But even if it could somehow be characterized as a different claim, he fails to make a prima facie showing that Claim 3(A) satisfies § 2244(b)(2)(B). Vreeland’s first § 2254 application referenced the same illegal recordings, indicating that he was aware of them in 2014. And his current proposed application asserts in Claim 30(A) that these recordings were in his counsel’s possession as early as 2010. Moreover, because Vreeland was aware of the substance of his conversations with his counsel when they

occurred, his proposed Claim 3(A) is not based on a newly discovered “factual predicate,” as required by § 2244(b)(2)(B)(i). Nor would proof of that factual predicate—that he never created a conflict with or fired his counsel—establish his innocence. *See Case*, 731 F.3d at 1035.

### **Claim 3(B)**

Vreeland’s proposed Claim 3(B) alleges that he has new evidence supporting his alibi defense that he was not with the minor victims on October 3-4, 2004, the date that the State specified the crime occurred in a Bill of Particulars. He asserts that, unbeknownst to him, two witnesses (who he does not identify) submitted sworn statements to the police that (1) they were with Vreeland on October 3-4 and Vreeland was not at the location the crimes allegedly occurred on those days; (2) Vreeland did not meet the victims until the week after October 3-4; and (3) the witnesses were with Vreeland at all times when he was with the victims and no crimes had occurred. Vreeland states that the witnesses had audio and video evidence supporting these statements. He also refers to an alibi defense document that he says is now in the record that had been missing from every previous version of the record.

Vreeland further asserts that these witnesses have issued sworn affidavits attesting that, when they contacted the district attorney and the lead detective for trial, they were falsely told that the trial had been rescheduled, preventing their testimony from being

presented at the trial.<sup>2</sup> He states that the district attorney and the lead detective concealed their misconduct by obtaining a protective order preventing Vreeland, his counsel, and his investigator from communicating with these witnesses. He does not state whether he subpoenaed these witnesses to testify in his defense. Vreeland has not submitted copies of any of this alleged newly discovered evidence.

To the extent that the “factual predicate” underlying this claim, § 2244(b)(2)(i), is that Vreeland was not with the minor victims on the date of the offenses specified in the Bill of Particulars, that fact is not newly discovered, as Vreeland knew where he was and who he was with on October 3-4, 2004, and it is clear from his first § 2254 application that he presented his alibi defense regarding those dates at the trial.

Vreeland may be contending that the newly discovered fact is the existence of the witnesses’ statements to police supporting his alibi for October 3-4, 2004, which he says he did not learn of until he received a complete copy of the record in 2018. Assuming that Vreeland has a claim under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), based on the suppression of exculpatory evidence by the State, the question is whether Vreeland has made a prima facie showing that he can demonstrate by clear and convincing evidence that, but for the *Brady* violation, no reasonable factfinder would have found him guilty of the offenses. *See Case*, 731 F.3d at 1039. Vreeland does not meet this burden. He does not attempt to show that the witnesses’ sworn statements to the police—or their trial

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<sup>2</sup> It is not clear whether these affidavits are newly obtained from the witnesses by Vreeland or if he is claiming that they were in the portion of the case record that he has recently discovered.

testimony—when viewed in light of the evidence as a whole, would be sufficient to establish his innocence by clear and convincing evidence. *See* § 2244(b)(2)(B)(ii). In particular, Vreeland’s argument that his newly discovered evidence supports a claim that the trial court violated state law by instructing the jury outside the specifications of the Bill of Particulars and by admitting evidence contrary to his alibi defense does not show that newly discovered facts, “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 any of the offenses with which he was charged, *id.*

### **Claim 30**

Vreeland’s proposed Claim 30 consists of eleven subparts (A-K), some of which are related and all of which, he says, are based on newly discovered evidence.

#### *Claim 30(A)*

In Claim 30(A), Vreeland contends that a security system recorded the words and actions of every person who entered his home from August 30 through October 15, 2004. He asserts that his former counsel and that counsel’s secretary had possession of the relevant video tapes, which they confirmed proved his innocence, but that they used the tapes as leverage against him to gain access to large sums of money in his bank accounts. Vreeland claims that his counsel and the secretary testified falsely about their possession

of the video tapes in a post-trial hearing, as demonstrated by illegal recordings of telephone calls between Vreeland and his counsel that he recently discovered.

This claim is based upon the same illegal recordings alleged in Vreeland's proposed Claim 3, the substance of which he was aware when the conversations with his counsel occurred. He therefore fails to make a prima facie showing that it relies on a newly discovered "factual predicate," as required by § 2244(b)(2)(B)(i). Moreover, even if the facts were newly discovered, Vreeland has not shown that these facts—his counsel's possession of the home security video tapes, counsel's confirmation that they proved his innocence, counsel's alleged blackmail, and counsel's alleged perjury—"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," § 2244(b)(2)(B)(ii). Vreeland makes no attempt to discuss these facts in light of the evidence as a whole, which included the testimony of the two minor victims and other witnesses. *See Case*, 731 F.3d at 1038 (stating that the relevant factual universe for satisfying § 2244(b)(2)(B)(ii) is the "evidence presented at the time of trial, adjusted for evidence that would have been admitted or excluded but for constitutional error during trial proceedings" (internal quotation marks omitted)). Additionally, to the extent Vreeland intends to assert in Claim 30(A) that his counsel provided constitutionally ineffective assistance by blackmailing him, he presented the same claim in his first § 2254 application, so it does not meet the requirements of § 2244(b)(1).

*Claims 30(B)-(G), (I)*

These proposed claims are all based on alleged newly discovered evidence related to a former sheriff's office sergeant who was fired in 2013 after being charged with criminal offenses. According to Vreeland, the sergeant pleaded guilty to sexual exploitation of a child and possession of child pornography in January 2014. Vreeland states that this sergeant acted as the evidence officer during the search of his home and was the evidence technician in his case, giving the sergeant complete access to all of the evidence in the case. He asserts that the sergeant manufactured and planted certain evidence and had undisclosed personal relationships with people associated with the case. He states that his new evidence was obtained through a private investigation into the sergeant's life, criminal case, and internet websites. Vreeland argued at trial that there was fake photo evidence added to his computer, but he attributed it to the lead detective on the case rather than this former sergeant.

Vreeland has not made a prima facie showing that Claims 30(B)-(G) and (I) satisfy the requirements of § 2244(b)(2)(B)(i). He asserts that the facts underlying these claims are newly discovered as a result of a private investigation of the former sheriff's office sergeant after the sergeant was arrested in 2013 and pleaded guilty to sex offenses in January 2014. But Vreeland did not file his first § 2254 application until August 2014, and the district court did not deny that application until December 2016. Vreeland does not address or explain why the new facts he alleges could not have been discovered previously—while his first § 2254 application was still pending in the district court—through the exercise of due diligence.

Vreeland also does not attempt to show that proof of these facts, when viewed in light of the evidence as a whole, would be sufficient to establish his innocence by clear and convincing evidence. *See* § 2244(b)(2)(B)(ii). Assuming for purposes of our analysis that this new evidence is “rooted in alleged constitutional error at his trial,” Vreeland does not sufficiently address “the likely impact of the evidence on reasonable jurors,” as required by § 2244(b)(2)(B)(ii), *Case*, 731 F.3d at 1039 (internal quotation marks omitted). He asserts that a reasonable person would conclude that the sergeant had planted evidence, and he argues that all of the evidence that the sergeant had access to was tainted and should have been excluded. But he does not discuss how any or all of the evidence related to the former sergeant that should have been admitted or excluded, when combined with the evidence presented at his trial—which he does not discuss—would clearly and convincingly establish that “no reasonable factfinder would have found [him] guilty of the underlying offense,” § 2244(b)(2)(B)(ii). He therefore has not satisfied his *prima facie* burden under that section as to these proposed claims.

*Claim 30(H)*

In this claim, Vreeland alleges he has new evidence from experts at Kodak Corp. that a digital camera used as evidence at his trial was tampered with, contrary to the testimony of a different Kodak witness at the trial. He says this evidence could not have been discovered before his trial, but he states that he obtained it in March 2014, five months before he filed his first § 2254 application. Vreeland therefore fails to make a *prima facie* showing that “the factual predicate for the claim could not have been discovered previously through the exercise of due diligence,” § 2244(b)(2)(B)(i).

*Claims 30(J)-(K)*

Vreeland asserts it has been revealed that evidence in his case, including his computers and the Kodak camera, left the chain of custody by being illegally mailed to Kodak Corp. He also claims that he learned in 2013 that an investigator told an unidentified defense witness (presumably falsely) that the witness's testimony would not be required in late 2006 because the trial had been rescheduled to 2007. Neither of these assertions satisfies any of the requirements of § 2244(b)(2)(B).

**Claim 31**

Vreeland asserts that his proposed Claim 31 relies on “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,” § 2244(b)(2)(A). But his citation to a Colorado Supreme Court case fails to demonstrate a new rule of constitutional law that the *United States* Supreme Court has made retroactive. *See Cannon v. Mullin*, 297 F.3d 989, 992-94 (10th Cir. 2002) (discussing the necessary prima facie showing that the United States Supreme Court has made a new constitutional rule retroactive).

**Claim 32**

Finally, in proposed Claim 32 Vreeland summarily raises claims of cumulative-error and actual innocence. He has not shown that these claims meet the requirements of § 2244(b)(2)(B)(ii).

**CONCLUSION**

Vreeland's motion for authorization to file a second or successive 28 U.S.C. § 2254 habeas application is denied based on his failure to make a prima facie showing

that any of his proposed claims satisfy the requirements of 28 U.S.C. § 2244(b). 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.” § 2244(b)(3)(E).

Entered for the Court

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

CHRISTOPHER M. WOLPERT, Clerk