

**FILED**

**United States Court of Appeals  
Tenth Circuit**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

**May 5, 2020**

**Christopher M. Wolpert  
Clerk of Court**

In re: GABRIEL AYALA,

Movant.

No. 20-2040  
(D.C. No. 1:20-CV-00163-MV-KBM)  
(D. N.M.)

**ORDER**

Before **BRISCOE, HARTZ, and McHUGH**, Circuit Judges.

Gabriel Ayala, proceeding pro se, seeks authorization to file a second or successive 28 U.S.C. § 2254 habeas petition. For the following reasons, we deny authorization.

Mr. Ayala pleaded guilty to seven counts of child abuse related to the alleged abuse of his two-month-old daughter. He was initially sentenced to thirty years in prison, but the state court later granted him partial relief on his application for post-conviction relief. The court determined that his counsel had been ineffective at sentencing and it subsequently resentenced Mr. Ayala to eighteen years in prison. Mr. Ayala then filed his first § 2254 habeas petition in federal court. The district court denied relief and this court denied a certificate of appealability.

Earlier this year, Mr. Ayala filed a second § 2254 habeas petition in district court. That court concluded that Mr. Ayala did not have the proper authorization to file a second

or successive § 2254 habeas petition and it transferred the petition to this court.

Mr. Ayala then filed the current motion for authorization.

Mr. Ayala now seeks authorization to bring a claim of actual innocence based on newly discovered evidence. To be entitled to authorization, he must show that “the factual predicate for the claim could not have been discovered previously through the exercise of due diligence.” 28 U.S.C. § 2244(b)(2)(B)(i). And he must also show that “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)(ii).

Mr. Ayala asserts that he has newly discovered medical evidence that could provide another reasonable explanation for his daughter’s injuries other than abuse. This evidence includes: his wife was taking the drug Paxil during her pregnancy, his daughter was diagnosed with a brittle bone condition, his daughter was born with certain other medical conditions, his daughter was born with eight healing rib fractures, and his daughter sustained a tibia fracture while he was incarcerated. But all of this evidence could have been previously discovered through the exercise of due diligence.

Mr. Ayala’s daughter was born in 2002 and he pleaded guilty in 2004. He contends this new medical information was not available to him until after a 2010 malpractice action against his attorney. We disagree. Mr. Ayala knew at least as early as 2009 that his attorney may not have reviewed all of the relevant medical evidence. He states in his motion for authorization that at a “2009 evidentiary hearing, counsel admitted that he had

never consulted with a medical expert to review the medical record.” Mot. for Auth. at 8. After the 2009 evidentiary hearing, Mr. Ayala should have been able to discover all of the relevant medical evidence through the exercise of due diligence prior to filing his first § 2254 habeas petition in December 2010.

In addition, Mr. Ayala has not established that—even with the new medical evidence—no reasonable jury would have convicted him of child abuse. In denying his first § 2254 habeas petition, the district court explained that the medical records showed Mr. Ayala’s daughter sustained multiple fractures, broken ribs, and a broken tibia, all of which occurred between August 27 and September 9, 2002. The court further explained that Mr. Ayala admitted to officials from youth and family services that he struck his daughter’s head three times and that he may have hugged her too hard.

Because Mr. Ayala could have discovered the factual predicate for his claims previously through the exercise of due diligence and the new evidence does not demonstrate that no reasonable juror would have convicted him of child abuse, he has not met the standard for authorization in § 2244(b)(2)(B). Accordingly, 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 'CWolpert', with a long horizontal stroke extending to the right.

CHRISTOPHER M. WOLPERT, Clerk