

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

July 14, 2022

Christopher M. Wolpert
Clerk of Court

In re: OMER EUGENE DAVIS,

Movant.

No. 22-6105
(D.C. No. 5:22-CV-00035-R)
(W.D. Okla.)

ORDER

Before **HARTZ**, **MATHESON**, and **ROSSMAN**, Circuit Judges.

Omer Eugene Davis is an Oklahoma prisoner serving a life sentence. He has already sought relief through a 28 U.S.C. § 2254 habeas application. He now seeks authorization to file another § 2254 application.¹

We may authorize a second or successive § 2254 claim if Mr. Davis makes a prima facie showing that one of these circumstances exists:

1. The “claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.”
2. The “factual predicate for the claim could not have been discovered previously through the exercise of due diligence” and “the facts underlying the claim . . . would be sufficient to establish by clear and convincing evidence that, but for

¹ Mr. Davis represents himself, so we construe his filings liberally. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.”

28 U.S.C. § 2244(b)(2), (b)(3)(C).

At various points, Mr. Davis says that Oklahoma lacked jurisdiction to prosecute him. And throughout his filings he cites *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), and *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *aff’d sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (2020). Yet Mr. Davis does not assert that these cases announced “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court.” § 2244(b)(2)(A). More than that, though, he explicitly denies that his new claims rely on a new rule of law. Mot. for Auth. at 9–10.

Mr. Davis instead asserts that his claims rely on newly discovered evidence: a list of “Cherokee Nation Attorneys” authorized to practice in “Indian Country.” *Id.* at 9. Absent from this list, Mr. Davis says, are the judge, prosecutor, and defense attorney who participated in his trial-court proceedings. This list does not warrant authorization for two reasons. First, Mr. Davis has not shown that the list was previously undiscoverable. He asserts that it was previously unavailable “because the Tribes were shut down for the National Emergency,” *id.* at 10, an apparent reference to the COVID-19 pandemic. But he does not explain why he could not have discovered the list before the pandemic and before he filed his first § 2254 application in 2015. Second, he has not shown that the list would have prevented a reasonable factfinder from finding him guilty.

In an attachment to his motion, Mr. Davis discusses witnesses and evidence such as hospital records, pictures, and a video recording. To the extent he seeks authorization

based on this evidence, he has not shown that it could not have been discovered previously.

We deny Mr. Davis authorization to file a new § 2254 application. This denial “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