

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

June 27, 2023

Christopher M. Wolpert
Clerk of Court

In re: DARYL ALAN HESS,

Movant.

Nos. 23-5061 & 23-5065
(D.C. Nos. 4:10-CV-00462-CVE &
4:10-CV-00435-GKF-TLW)
(N.D. Okla.)

ORDER

Before **McHUGH, KELLY**, and **CARSON**, Circuit Judges.

Daryl Alan Hess, a pro se Oklahoma inmate, has filed two motions for authorization to file second or successive 28 U.S.C. § 2254 petitions. He also moves for appointment of counsel and requests an evidentiary hearing. For the reasons that follow, we deny his motions for authorization, as well as his requests for appointment of counsel and an evidentiary hearing.

Hess was convicted in two separate state cases of robbery with a firearm and possession of a firearm after a prior felony, and robbery with a firearm and kidnapping. His convictions were affirmed on appeal, and the state courts denied postconviction relief. Hess also sought relief under § 2254, which the district court denied. He then sought to appeal the denial of his § 2254 petitions. We consolidated his cases with a third case in which he sought to appeal the denial of a § 2254 petition involving his conviction for yet another robbery, and denied a certificate of appealability in all three cases. *See*

Hess v. Trammell, 535 F. App'x 765, 767 (10th Cir. 2013). Hess now seeks authorization to file second or successive § 2254 petitions in the robbery/possession and robbery/kidnapping cases, asserting he has newly discovered evidence to challenge his convictions.

To obtain authorization based on newly discovered evidence, a § 2254 petitioner must make a prima facie showing that:

- (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
- (ii) 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 the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2)(B); *see also id.* § 2244(b)(3)(C) (allowing authorization only if “the [proposed second or successive] application makes a prima facie showing that the application satisfies the [foregoing statutory] requirements”).

Hess does not make the required showing. Although he purports to rely on new, previously undiscoverable evidence to support his claims, he fails to identify any such evidence that would “show[] a high probability of actual innocence,” *Gonzales v. Crosby*, 545 U.S. 524, 530 (2005). Instead, he offers his own assertions and speculation. He also asks us to appoint counsel “to investigate and collect supporting evidence to present to this court . . . when the newly discovered evidence or factual predicate became available, as well as [to] gather[] for this court all [his] due diligence efforts.” Mot. for Appointment of Counsel at 1. Having failed to satisfy his statutory burden, however, we deny his motion for authorization. We also deny as moot his motions for appointment of

counsel and an evidentiary hearing. 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 'C. Wolpert', with a long horizontal stroke extending to the right.

CHRISTOPHER M. WOLPERT, Clerk