

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE: CARL DEAN WYATT,

Movant.

No. 07-6216
(D.C. No. CIV-07-681-R)

ORDER
Filed October 12, 2007

Before **O'BRIEN**, **McCONNELL**, and **GORSUCH**, Circuit Judges.

In 1998, Carl Dean Wyatt was found guilty of first-degree murder and conspiracy to commit robbery with a firearm and was sentenced to consecutive terms of life imprisonment without parole and sixty years. In 2000, he filed a habeas petition under 28 U.S.C. § 2254, which the district court denied. This court denied a certificate of appealability. Mr. Wyatt now seeks leave to file a second or successive § 2254 petition challenging his conviction and sentence.

A petitioner seeking to bring a second or successive § 2254 petition may proceed only with a claim not presented in a prior application that (A) “relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,” or (B) relies on facts that “could not have been discovered previously through the exercise of due

diligence” and that “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)(1), (b)(2)(A), (b)(2)(B).

Mr. Wyatt argues that he has discovered new facts to support his claims of ineffective assistance of counsel, prosecutorial misconduct, and judicial error. His showing is insufficient to support the filing of a second or successive § 2254 petition. First, it appears that Mr. Wyatt asserted an ineffective-assistance claim in his first habeas proceeding. *See* 12/21/01 Dist. Ct. Order at 1-2; 4/25/01 Mag. Judge Report & Rec. at 2, 11-12. It also appears that Mr. Wyatt previously asserted a claim regarding the prosecutor’s conduct. *See* 4/25/01 Mag. Judge Report & Rec. at 2, 10-11. Claims raised in a prior petition must be dismissed. 28 U.S.C. § 2244(b)(1). Second, to the extent that Mr. Wyatt’s claims of knowingly-presented perjured testimony and judicial error in not removing his counsel were not raised in his previous petition, Mr. Wyatt does not explain why his new facts “could not have been discovered previously through the exercise of due diligence,” *id.* § 2244(b)(2)(B)(i), and he has not shown 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. Wyatt's motion for leave to file a second or successive § 2254 petition is DENIED. This denial of authorization is not appealable and may not be the subject of a petition for rehearing or for a writ of certiorari. *See* 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court,

A handwritten signature in cursive script that reads "Elisabeth A. Shumaker". The signature is written in black ink and has a long, sweeping underline that extends to the right.

Elisabeth A. Shumaker, Clerk