

April 23, 2008

UNITED STATES COURT OF APPEALS

Elisabeth A. Shumaker  
Clerk of Court

FOR THE TENTH CIRCUIT

In re:

GABRIEL FLORES,

Movant.

No. 08-2057  
(D.C. No. CIV-08-211-JH-RHS)  
(D.N.M.)

ORDER

Before **TACHA, MURPHY, and McCONNELL**, Circuit Judges.

Movant Gabriel Flores, a New Mexico state inmate proceeding pro se, has filed a motion for authorization to file a second or successive 28 U.S.C. § 2254 habeas corpus petition under 28 U.S.C. § 2244(b). We deny leave.

Flores was convicted in 2002 in New Mexico state court of kidnapping and criminal sexual penetration. He filed a § 2254 petition collaterally challenging that conviction in 2004 that was dismissed by the district court without prejudice for failure to exhaust.

Flores filed a second § 2254 petition in federal court in July 2005 that was dismissed with prejudice. *Flores v. Ulibarri*, No. CIV-05-819-NCA-LFG (D.N.M. May 12, 2006). He filed his present, and third, § 2254 petition in the district court in March 2008, that the district court transferred to this court under

28 U.S.C. § 1631. *See Spitznas v. Boone*, 464 F.3d 1213, 1217 (10th Cir. 2006);  
28 U.S.C. § 2244(b)(3).

Flores has now filed a motion requesting authorization to file a second or successive § 2254 petition. To obtain permission to file a second or successive § 2254 petition, Flores must show that he has not raised his claim in a previous habeas petition, 28 U.S.C. § 2244(b)(1), and that his new claim either “relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,” *id.* § 2244(b)(2)(A), or depends on facts, previously undiscoverable through the exercise of due diligence, that would establish by clear and convincing evidence that he was not guilty of the offense, *id.* § 2244(b)(2)(B).

Flores wishes to assert a double-jeopardy claim apparently based on the enhancement of his sentence due to his habitual-criminal history, and a claim that a “case worker” altered some papers resulting in the “illegal aggravation of [his] sentence.” Mot. for Auth. at 6. The only claim Flores characterizes as relying on new evidence is his double jeopardy claim.

Flores’ claims do not meet the requirements of § 2244(b)(2). He presents no newly discovered evidence because all of the facts underlying his claims were either known to him at the time of the trial or could have been discovered by the exercise of due diligence. He has not demonstrated that his claimed evidence was

not previously available or discoverable, or that his claimed evidence establishes by clear and convincing proof that he is not guilty of the offense.

Accordingly, we DENY Flores leave to file a second or successive § 2254 petition. This denial of authorization is not appealable and shall 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, reading "Elisabeth A. Shumaker", with a long horizontal flourish extending to the right.

ELISABETH A. SHUMAKER, Clerk