

October 20, 2008

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

In re:

DANIEL O'NEILL,

Movant.

No. 08-2236

ORDER

Before **MURPHY, O'BRIEN** and **TYMKOVICH**, Circuit Judges.

Daniel O'Neill, a New Mexico state prisoner proceeding pro se, seeks authorization to file a second or successive habeas corpus petition under 28 U.S.C. § 2244(b). We deny authorization.

In 1997, Mr. O'Neill pleaded guilty to three counts of sexual contact with a minor and no contest to having been convicted of three prior felonies. Due to an enhancement for being a habitual offender, he was sentenced to thirty-three years of imprisonment, followed by two years of parole.

In 2004, Mr. O'Neill filed a habeas petition under 28 U.S.C. § 2254 alleging that his trial counsel had been ineffective because counsel (1) failed to argue that the enhancement was invalid since one of the felonies used to enhance his sentence was over twenty years old; (2) failed to act on the knowledge that Mr. O'Neill had been involved in a relationship with the trial judge's wife;

(3) lied to Mr. O'Neill about the plea agreement and told him that the district attorney would remain silent about his habitual-offender status; and (4) failed to properly represent him. Also, Mr. O'Neill argued that the state courts failed to properly consider his post-conviction motions. The magistrate judge recommended that the petition be dismissed as time barred. After Mr. O'Neill failed to object to that recommendation, the district court adopted it, dismissed the petition, and, later, denied a certificate of appealability (COA). We too denied a COA, and then dismissed Mr. O'Neill's appeal. *O'Neill v. Janecka*, 168 F. App'x 263 (10th Cir. 2006).

On May 14, 2008, Mr. O'Neill filed another federal habeas corpus petition, alleging that the trial judge should have recused himself for bias because Mr. O'Neill had offended the judge's wife and the district attorney violated the plea agreement by failing to remain silent during sentencing and by instead speaking about the habitual offender sentence enhancement. Relying on *In re Cline*, 531 F.3d 1249, 1251-53 (10th Cir. 2008) (per curiam), the district court dismissed the petition (without prejudice) as successive. The court found that the claim of judicial bias due to a relationship between Mr. O'Neill and the trial judge's wife appeared on its face to be fantastical. Also, the court found that Mr. O'Neill did not base his claims on newly discovered evidence unknown to him at the time of trial or sentencing or a new rule of constitutional law that has

been made retroactive and, therefore, it was unlikely this court would grant permission to file a second or successive petition. *See* 28 U.S.C. § 2244(b)(2).

In his motion for authorization to file a second or successive habeas petition, Mr. O’Neill again argues that (1) the trial judge should have recused himself for bias because the judge, his wife, and Mr. O’Neill had a personal relationship that went bad when he offended the judge’s wife; (2) the district attorney failed to remain silent at sentencing about a habitual sentence, as agreed in the plea agreement; and (3) his trial counsel was ineffective for failing to argue that the district attorney had agreed to remain silent. Mr. O’Neill concedes that he made these arguments previously and that they are not based on a new rule of law or newly discovered evidence, as is required for authorization under § 2244(b)(2).

We may not authorize a prisoner to file a claim presented in a prior habeas petition. We “may authorize the filing of a second or successive application only if it presents a claim not previously raised that satisfies one of the two grounds articulated in § 2244(b)(2).” *Burton v. Stewart*, 549 U.S. 147, 127 S. Ct. 793, 796 (2007) (per curiam).

Accordingly, we DENY Mr. O’Neill’s motion for authorization. This

denial of authorization is not 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 cursive script, reading "Elisabeth A. Shumaker", followed by a long horizontal flourish.

ELISABETH A. SHUMAKER, Clerk