

October 6, 2008

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

In re:

ANTHONY KIMBROUGH,

Movant.

No. 08-5132

ORDER

Before **TACHA, EBEL, and GORSUCH**, Circuit Judges.

Anthony Kimbrough seeks authorization to file a second or successive 28 U.S.C. § 2254 petition. Because Mr. Kimbrough cannot meet the requisite conditions under 28 U.S.C. § 2244, we deny authorization and dismiss the proceeding.

In 1994, Mr. Kimbrough was convicted of first degree murder, drug trafficking, and failure to obtain a drug stamp. His conviction was affirmed on direct appeal. His application for state post-conviction relief was denied in 1997. He filed his first § 2254 petition in 1998, and it was dismissed as time-barred by the district court. We denied his request for a certificate of appealability and dismissed the appeal. He now seeks authorization to file a second or successive § 2254 petition.

In order to be entitled to authorization, Mr. Kimbrough must first show that he did not present any of the claims that he now seeks to raise in his prior § 2254 petition. *See* 28 U.S.C. § 2244(b)(1) (“A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.”). Next, he must show either:

- (A) . . . that 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; or
- (B)(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.

Id. § 2244(b)(2).

In his first § 2254 petition, Mr. Kimbrough asserted two claims:

(1) government intrusion into the attorney client relationship deprived him of a fair trial and effective assistance of counsel in violation of the Sixth Amendment; and (2) the state court entered opinions that conflict with other courts, including the United States Supreme Court. In his request for authorization, Mr. Kimbrough seeks permission to file a § 2254 petition asserting the following claim: that his due process and Sixth Amendment rights were violated because he was incompetent to stand trial. Because this claim was not previously raised, § 2244(b)(1) does not prevent Mr. Kimbrough from seeking authorization.

In order to satisfy § 2244(b)(2), Mr. Kimbrough argues that the factual predicate for his claim could not have been discovered until January 31, 2006, when his mother retained attorney Otis William. This date, he asserts, was “the first time someone of competence stepped [in to] recognize and deal with the myriad legal issues in [his] case.” Mot. for Auth. at vi. Also on that date, he received a psychiatric evaluation, which allegedly determined he was “incompetent during his trial and some thirteen (13) year[s] thereafter.” *Id.* at v. Mr. Kimbrough admits, however, that during his trial in 1994 his defense counsel “filed [a] third motion for continuance of jury trial arguing and questioning upon petitioner’s present competency.” *Id.* at 1. Mr. Kimbrough has failed to demonstrate he could not have discovered the factual predicate for this claim when he filed his first § 2254 petition in 1998. Moreover, the facts underlying this claim— that Mr. Kimbrough allegedly had mental health issues rendering him incompetent to stand trial— do not “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. § 2254(b)(2).

Authorization to file a second or successive § 2254 petition is DENIED and the matter is DISMISSED. 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*

id. § 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