

UNITED STATES COURT OF APPEALS April 16, 2008

FOR THE TENTH CIRCUIT Elisabeth A. Shumaker
Clerk of Court

In re: TERRILL DEWAYNE
GURLEY, Jr.,

Movant.

No. 08-6072

ORDER

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

Terrill Dewayne Gurley, Jr., an Oklahoma state prisoner proceeding pro se, has filed a motion for authorization to file a second or successive petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. We deny the motion.

In 2001, Mr. Gurley pled guilty to eight counts: (1) robbery with a firearm; (2) kidnaping; (3) first-degree burglary; (4) larceny of an automobile; (5) possession of a firearm after a felony conviction; (6) forcible entry; (7) first-degree burglary; and (8) attempting to intimidate a State's witness. He was sentenced to ninety-nine years of imprisonment on counts 1, 2 and 8; seventy-five years of imprisonment on counts 3, 4, 5, and 7; and one year of imprisonment on count 6, with all sentences to run consecutively. On direct appeal, the Oklahoma Court of Criminal Appeals reversed the conviction and sentence for count 7 and affirmed all other convictions and sentences.

On April 1, 2003, Mr. Gurley filed a federal habeas petition asserting that (1) his multiple punishments for the same offense violate the Double Jeopardy Clause; and (2) his sentences are excessive. The district court denied habeas relief. On appeal, we denied a certificate of appealability and dismissed the appeal. *Gurley v. Fatkin*, No. 03-6269 (10th Cir. Mar. 17, 2004) (order).

In his motion for authorization to file a second or successive habeas petition, Mr. Gurley argues that (1) his appellate counsel was ineffective for failing to argue that trial counsel was ineffective at sentencing; (2) the prosecutor's improper remarks at sentencing denied him due process; and (3) there was insufficient evidence to support his first-degree robbery conviction. He contends that we should grant authorization on all three of these claims because they were not presented in his prior habeas petition and because they are based on newly discovered evidence.

It is true that Mr. Gurley did not raise these claims in his prior habeas petition. But, contrary to his assertion, they are not based on newly discovered evidence. Rather, all three claims could have been presented in his prior habeas petition because "the factual predicate for [each] could . . . have been discovered previously through the exercise of due diligence." 28 U.S.C. § 2244(b)(2)(B)(I). Also, Mr. Gurley has not satisfied his burden of setting forth "new facts showing a high probability of actual innocence." *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005) (discussing requirement of 28 U.S.C. § 2244(b)(2)(B)(ii)). His first and

second claims do not concern actual innocence; they relate exclusively to his sentencing. *See Reid v. Oklahoma*, 101 F.3d 628, 630 (10th Cir. 1996) (recognizing that actual innocence does not apply to non-capital sentencing challenges). And his third claim does not present any new facts suggesting he is actually innocent.

Accordingly, we DENY Mr. Gurley's motion for authorization to file a second or successive habeas 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). In addition, we DENY Mr. Gurley's request that we order and review the transcript of his sentencing hearing.

Entered for the Court,



ELISABETH A. SHUMAKER, Clerk