

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

November 12, 2009  
Elisabeth A. Shumaker  
Clerk of Court

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In re:

ROBERT JACK FOLDENAUR,  
  
Movant.

No. 09-6251

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**ORDER**

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Before **TACHA, KELLY, O'BRIEN**, Circuit Judges.

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Movant Robert Jack Foldenaur, an Oklahoma state prisoner appearing pro se, has filed a motion for authorization to file a second or successive 28 U.S.C. § 2254 habeas corpus petition seeking to challenge his rape conviction. We deny authorization.

Mr. Foldenaur was convicted of two counts of rape in 2003. He filed his first § 2254 petition challenging his rape conviction in 2007. That petition was dismissed by the district court as time-barred, and this court denied Mr. Foldenaur a certificate of appealability. *Foldenaur v. Franklin*, 261 F. App'x 93, 94 (10th Cir. 2008). Before a state prisoner may file a second or successive § 2254 petition, the prisoner must first “move in the appropriate court of appeals for an order authorizing the district court to consider the application.” 28 U.S.C. § 2244(b)(3)(A). A district court does not have

jurisdiction to address the merits of a second § 2254 petition unless the circuit court has granted the required authorization. *In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008).

Mr. Foldenaur now seeks this court's authorization to file a second § 2254 petition. He states in his motion for authorization that he wishes to present a claim that he received ineffective assistance of counsel when his attorney deliberately withheld the filing of his first § 2254 petition.

To obtain permission to file a second or successive § 2254 petition, Mr. Foldenaur must show that he has not raised his claims in a previous habeas application, 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 "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," *id.* § 2244(b)(2)(B).

Mr. Foldenaur fails to make the required *prima facie* showing that his proposed claims satisfy the authorization requirements of § 2244(b)(2). He acknowledges that his claim is not based on any new constitutional law. Indeed, there is no right to counsel in collateral proceedings. *Pennsylvania v. Finley*,

481 U.S. 551, 555 (1987). He does assert that his claim is based on new evidence. Mr. Foldenaur does not include any such evidence in his motion for authorization; rather, he merely states that he was previously unaware that his counsel had not timely filed his first § 2254 petition. Any such evidence of his counsel's failure to file a timely § 2254 petition would not establish a prima facie showing that, but for this evidence, no reasonable factfinder would have found Mr. Foldenaur guilty of the underlying offense. Thus, it would be insufficient to satisfy the requirements of § 2244(b)(2)(B).

Accordingly, we DENY Mr. Foldenaur authorization to file his proposed 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." 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court,



ELISABETH A. SHUMAKER, Clerk