

UNITED STATES COURT OF APPEALS **December 16, 2010**
FOR THE TENTH CIRCUIT
Elisabeth A. Shumaker
Clerk of Court

In re:

CHARLES C. REED, JR.,

Movant.

No. 10-6264

ORDER

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

Charles C. Reed, Jr., an Oklahoma state prisoner proceeding pro se, seeks authorization to file a second or successive 28 U.S.C. § 2254 petition for a writ of habeas corpus. We deny authorization.

In 1986, Mr. Reed was convicted of two counts of first-degree robbery and three counts of grand larceny. He was sentenced to 110 years' imprisonment. Mr. Reed filed his first § 2254 petition in 1993, "rais[ing] seven claims: (1) his retrospective competency hearing was invalid because it was held three and one-half years after his trial and he was unable to confront key witnesses who had died; (2) the prosecutor engaged in misconduct during the trial; (3) a prior conviction used for enhancement purposes was invalid; (4) the prosecution did not establish an essential element for one of the crimes of which he was convicted; (5) the trial court failed to instruct the jury regarding a lesser included

offense for one of his charges; (6) his trial counsel was ineffective; and (7) his appellate counsel was ineffective.” *Reed v. Champion*, Nos. 94-6068, 94-6227, 1995 WL 4007, at **2 (10th Cir. Jan. 6, 1995). The district court adopted the magistrate judge’s recommendation to deny relief. Also, the court denied for lack of jurisdiction Mr. Reed’s Fed. R. Civ. P. 60(b) motion to vacate the judgment and amend his complaint. On appeal, we reversed and remanded for further proceedings on the first and fourth claims and affirmed as to the other claims. *Reed*, 1995 WL 4007, at **1, 3, 4. Additionally, we vacated as moot the district court’s decision on the motion to vacate and amend. *Id.* at **4.

“On remand, the district court determined that the retrospective competency hearing passed constitutional muster” and denied “habeas relief on that issue.” *Reed v. Champion*, No. 96-6402, 1998 WL 33928, at *1 (10th Cir. Jan. 29, 1998), *cert. denied*, 525 U.S. 831 (1998). The court decided that the fourth claim had merit and ordered the State to file appropriate charging documents for the lesser included offense of petit larceny or release Mr. Reed from custody on the challenged count within sixty days.¹ *Id.* During the sixty days, the Supreme Court in *Cooper v. Oklahoma*, 517 U.S. 348 (1996), held unconstitutional Oklahoma’s presumption that a defendant is competent unless he shows he is not competent by clear and convincing evidence. Mr. Reed moved for

¹ Because the State did not make the appropriate filing, habeas corpus was granted on one of the grand larceny counts and Mr. Reed’s sentence was reduced by twenty years.

reconsideration of the competency issue, but the court denied reconsideration because he had failed to exhaust this claim. *Reed*, 1998 WL 33928, at *1. Also, the court denied his request to hold proceedings in abeyance while he exhausted state court remedies.

Mr. Reed appealed the district court's denial of relief on the competency hearing issue, the court's refusal to reconsider after *Cooper*, and the court's refusal to abate his habeas petition pending exhaustion of a *Cooper* claim. *Id.* While the appeal was pending, he filed a motion for authorization to file a second or successive § 2254 habeas petition based on *Cooper*. We denied authorization. *Reed v. Champion*, No. 97-717 (10th Cir. May 8, 1997) (unpublished order). Thereafter, in the pending appeal, we denied a certificate of probable cause and dismissed the appeal. *Reed*, 1998 WL 33928, at *3. In doing so, we noted that “if [Mr. Reed] would like to pursue federal habeas relief on his now-exhausted *Cooper* claim, he is free, pursuant to 28 U.S.C. § 2244(b)(3)(A), to ask this court for an order authorizing the district court to consider a second application for a writ of habeas corpus.” *Reed*, 1998 WL 33928, at *3.

Mr. Reed filed a second § 2254 petition in 2008, asserting that he was prejudiced when an allegedly void prior conviction was used to enhance his sentence. He had raised this issue in his first petition. The district court dismissed for lack of jurisdiction because the petition was second or successive and Mr. Reed had not obtained authorization from this court to file it.

Mr. Reed now seeks authorization from us to assert two claims in a second or successive § 2254 petition: (1) he is actually innocent of robbery by force and fear and instead he committed grand larceny; and (2) the combined errors that occurred before, during, and after his trial concerning the competency determination denied him a fair trial. He admits that he raised the second issue previously, but he asserts that both issues rely on newly discovered evidence.

Because the second claim was raised previously, we must dismiss it. *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.”). In order to receive authorization to pursue the first claim, based on newly discovered evidence, Mr. Reed must make a prima facie showing that “the factual predicate for the claim could not have been discovered previously through the exercise of due diligence” and “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 [him] guilty of the underlying offense.” 28 U.S.C. § 2244(b)(2)(B).

We conclude that Mr. Reed has not met his burden of showing due diligence. He contends that his claim is supported by the preliminary hearing and trial transcripts. Those transcripts were available at the time he filed his first

§ 2254 petition. Because Mr. Reed has not shown due diligence, his claim does not rely on newly discovered facts.

Accordingly, we DENY authorization and DISMISS this action. The 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). We DENY Mr. Reed’s requests that we order the state trial court to produce the preliminary hearing and trial transcripts and that we grant him the opportunity to present legal authority to this court or to the district court establishing precedence for using a polygraph test as a probative device.

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