

UNITED STATES COURT OF APPEALS February 8, 2010

FOR THE TENTH CIRCUIT Elisabeth A. Shumaker  
Clerk of Court

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In re:

JIMMIE ODELL BRUNER,  
  
Movant.

No. 10-7002

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**ORDER**

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Before **KELLY, BRISCOE, and TYMKOVICH**, Circuit Judges.

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Jimmie Odell Bruner seeks authorization to file a second or successive 28 U.S.C. § 2254 petition. Because he has not made the requisite showing under 28 U.S.C. § 2244(b)(2), we deny his request.

In April 1992, a jury found Mr. Bruner guilty of rape, burglary, and robbery by force and fear. The Oklahoma Criminal Court of Appeals affirmed his conviction. In June 1995, he filed a § 2254 petition, which was denied. On appeal, we denied his request for a certificate of appealability. In 2002, 2003, and 2004, he filed motions for authorization to file second or successive § 2254 petitions. All of those requests were denied. Mr. Bruner now seeks leave to file another second or successive § 2254 petition, arguing that he has newly discovered evidence to support his claim for a new trial.

Mr. Bruner’s request for authorization to file a second or successive § 2254 petition may be granted if his new claim relies on a “factual predicate . . . [that] could not have been discovered previously through the exercise of due diligence,” 28 U.S.C. § 2244(b)(2)(B)(i); and “the facts underlying the claim, if proven . . . 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[s],” *id.* § 2244(b)(2)(B)(ii).

Mr. Bruner asserts that he has newly discovered evidence to support his claim for a new trial because of a recently obtained test of the fingerprints taken from the crime scene. He asserts that “[t]he AFIS [Automated Fingerprint Identification System] test results positively prove[] that the fingerprints were identifiable, and that they do not match petitioner.”<sup>1</sup> Mot. for Auth. at 8b. While the AFSI technology for fingerprint testing was not available at trial, the evidence Mr. Bruner seeks to introduce is not new. At trial, the jury heard testimony that the fingerprints could not be identified as belonging to Mr. Bruner. The new AFSI test is therefore consistent with the testimony at trial and does not present new evidence establishing Mr. Bruner’s innocence. Moreover, Mr. Bruner has not

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<sup>1</sup> This does not appear to be an accurate characterization of the fingerprint test report, which indicates that “the known fingerprints of [Mr. Bruner] lacked detail in the extreme tips of the fingers to allow for a complete comparison,” one print from the crime scene was “searched through the [AFIS] with no identification,” and the other fingerprint from the crime scene “was not of sufficient quality for an automated search.” *See Criminalistics Examination Report* (attached to Motion for Authorization).

asserted that “but for constitutional error” he would not have been found guilty. *See* 28 U.S.C. § 2244(b)(2)(B)(ii); *see also In re Schwab*, 531 F.3d 1365, 1366-67 (11th Cir. 2008) (per curiam) (noting that motion for authorization did not satisfy § 2244(b)(2)(B)(ii) because it failed to assert constitutional error).

Because Mr. Bruner has failed to satisfy the requisite conditions in 28 U.S.C. § 2244(b)(2), authorization to file a second or successive § 2254 petition is DENIED. 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