

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

January 29, 2015

FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

In re:

ALVIN PARKER,

Movant.

No. 14-6246
(D.C. No. 5:96-CV-00335-T)
(W.D. Okla.)

ORDER

Before **PHILLIPS**, **EBEL**, and **McHUGH**, Circuit Judges.

Alvin Parker, a state prisoner proceeding *pro se*, seeks authorization to file a successive 28 U.S.C. § 2254 habeas application concerning his Oklahoma conviction for second degree murder. We deny the motion for authorization.

In 1990, Parker was convicted of second degree murder and sentenced to 199 years in prison. His conviction was affirmed on direct appeal. His numerous state court post-conviction proceedings and efforts to obtain federal habeas relief were unsuccessful. Most recently, this court denied Parker’s request for a certificate of appealability that would have allowed him to appeal from the district court’s order denying an unauthorized successive § 2254 habeas application. In that proceeding, Parker argued that a key witness, Glenn Briggs, had recanted his trial testimony naming Parker as the murderer, and the prosecution knew that Briggs’ testimony was false. *Parker v. Martin*, Nos. 14-6111 & 14-6174, 2014 WL 5462360, at *2-3

(10th Cir. Oct. 29, 2014). This court held that even assuming Briggs' testimony was false, Parker had failed to show that the prosecution knew the testimony was false.

Parker now seeks authorization from this court to file a second or successive § 2254 habeas application on the same grounds raised and rejected in his recent § 2254 proceeding. To obtain authorization Parker must show 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 the applicant guilty of the underlying offense.” 28 U.S.C. § 2244(b)(2)(B)(i), (ii). We focus our analysis on the second prong, which requires a showing of constitutional error.

To tie a recanting witness to a constitutional error, Parker “must show that (1) [the witness’s] testimony was in fact false, (2) the prosecution knew it to be false, and (3) the testimony was material.” *United States v. Caballero*, 277 F.3d 1235, 1243 (10th Cir. 2002). Parker must establish all three elements. *See id.* at 1244. Lacking any direct evidence that the prosecution knew Briggs' testimony was false, Parker asks us to infer such a fact. We addressed and rejected this argument in Parker's most recent appeal. *See Parker*, 2014 WL 5462360, at *3.

Attached to Parker's amended motion for authorization is a letter allegedly written by Briggs and sent to Parker on or about November 25, 2014. In this letter,

Briggs provides additional details about the “false” story he gave to the police. These additional “facts,” even if true, do nothing to establish that the prosecution knew that Briggs’ testimony was false, nor do they support any such inference.

Last, Parker appears to argue that Briggs’ recantation is sufficient to establish his actual innocence. However, without a link to an underlying constitutional violation (and there is none), Parker’s argument is nothing more than a stand-alone claim of actual innocence, which does not meet the test under § 2244(b)(2)(B)(ii).

[T]he universe of facts that enter into the subparagraph (B)(ii) analysis consists *only* of evidence presented at the time of trial, adjusted for evidence that would have been admitted or excluded “but for constitutional error” during trial proceedings. The factual universe does not encompass new facts that became available only after trial and that are not rooted in constitutional errors occurring during trial.

Case v. Hatch, 731 F.3d 1015, 1038 (10th Cir.), *cert denied*, 134 S. Ct. 269 (2013).

The motion for authorization is denied. This denial of authorization “shall not be 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 Parker’s Motion to Incorporate Records on Former Appeal because this court can take judicial notice of his prior proceedings, as appropriate.

Entered for the Court



ELISABETH A. SHUMAKER, Clerk