

**FILED**

**United States Court of Appeals  
Tenth Circuit**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

**July 28, 2016**

**Elisabeth A. Shumaker  
Clerk of Court**

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In re: CHESTER L. BIRD,

Movant.

No. 16-8076  
(D.C. No. 2:98-CV-00183-WFD)  
(D. Wyo.)

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**ORDER**

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

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Chester Bird, a Wyoming state prisoner proceeding pro se, moves for authorization to file a second or successive 28 U.S.C. § 2254 habeas application. We deny authorization.

Mr. Bird pled guilty to one count of first-degree sexual assault and one count of kidnapping and was sentenced to two concurrent life sentences. The Wyoming Supreme Court has upheld his convictions and sentence in the face of numerous state-court motions seeking to withdraw his guilty plea and challenge the legality of his sentence. He also has been unsuccessful in federal court: the district court has denied four petitions for habeas relief against the Wyoming Department of Corrections, and this court has denied five applications for a COA and one motion to file a second or successive § 2254 petition.

This court must authorize Mr. Bird's second or successive § 2254 application before it can be filed in the district court. To obtain authorization, he must show that his

claim relies on (A) “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,” or (B) new facts that “could not have been discovered previously through the exercise of due diligence” and 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 of the underlying offense.” 28 U.S.C. § 2244(b)(2)(A), (b)(2)(B)(i),(ii). Mr. Bird seeks to bring two claims, one based on each prong, but does not satisfy either gatekeeping requirement.

Mr. Bird’s first claim is that two terms within the Wyoming statutes governing first-degree sexual assault and kidnapping— “reasonably calculated” and “substantially unharmed”—are unconstitutionally vague in light of the Supreme Court’s decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Johnson* voided, in part, the definition of a qualifying “violent felony” used for sentence enhancement under the Armed Career Criminal Act (ACCA). The Supreme Court held that the “residual clause” in that definition—covering crimes “involv[ing] conduct that presents a serious potential risk of physical injury to another,” 18 U.S.C. § 924(e)(2)(B)(ii)—violated the constitutional prohibition against vague criminal laws. *Johnson*, 135 S. Ct. at 2557, 2563. Mr. Bird has not demonstrated the requisite connection between his claim and the new rule of constitutional law established in *Johnson*. A claim challenging the constitutionality of these Wyoming statutes is not based on the holding in *Johnson*.

Mr. Bird's second claim is that the Wyoming Supreme Court committed a procedural error by applying the wrong standard of review during his first appeal. Mr. Bird has not established that he could not have discovered the factual predicate for this claim previously through the exercise of due diligence. Nor would the facts underlying the claim be sufficient, in light of the evidence as a whole, "to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense." *See* 28 U.S.C. § 2244(b)(2)(B).

For these reasons, we deny Mr. Bird's motion for authorization. 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).

Entered for the Court



ELISABETH A. SHUMAKER, Clerk