

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FREDDIE WRIGHT,

Petitioner,

v.

D. DEXTER, Warden,

Respondent.

No. 08-73272

ORDER

Filed October 14, 2008

Before: Kim McLane Wardlaw, William A. Fletcher and
Johnnie B. Rawlinson, Circuit Judges.

ORDER

The application for authorization to file a second or successive 28 U.S.C. § 2254 habeas corpus petition in the district court is denied. Petitioner has not made a *prima facie* showing under 28 U.S.C. § 2244(b)(2) that:

(A) the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) 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 fact finder would have found the applicant guilty of the underlying offense.

Petitioner asserts that the district court should vacate his sentence because it was imposed in violation of *Cunningham v. California*, 549 U.S. 270 (2007). We have held that *Cunningham* “did not announce a new rule of constitutional law.” *Butler v. Curry*, 528 F.3d 624, 639 (9th Cir. 2008). Therefore, *Cunningham* cannot form the basis of an application for a second or successive 28 U.S.C. § 2254 habeas corpus petition.

No petition for rehearing or motion for reconsideration shall be filed or entertained in this case. *See* 28 U.S.C. § 2244(b)(3)(E).

DENIED.

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