

APPENDIX A

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEP 14 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

REX DUANE STEPHENSON,

Petitioner-Appellant,

v.

BRANDON KELLY, Superintendent
Oregon St. Penitentiary,

Respondent-Appellee.

No. 20-35235

D.C. No. 6:17-cv-00685-MC
District of Oregon,
Eugene

ORDER

Before: RAWLINSON and BRESS, Circuit Judges.

The request to stay proceedings (Docket Entry No. 2) is denied.

The certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

In his request for a certificate of an appealability, appellant asserts a new claim that his conviction by a non-unanimous jury violated his constitutional rights but concedes that this claim was never raised in the district court proceedings and

has not been exhausted in the state courts. To the extent appellant seeks to raise this claim in federal court, this new claim is more properly pursued in an application for authorization to file a second or successive 28 U.S.C. § 2254 habeas corpus petition in the district court that complies with the requirements of Ninth Circuit Rule 22-3. Specifically, the application must:

- (1) include the proposed second or successive section 2254 petition that the appellant seeks to file in the district court; and
- (2) state as to each claim presented whether it previously has been raised in any state or federal court and, if so, the name of the court and the date of the order disposing of such claim(s); and
- (3) state how the requirements of section 2244(b) have been satisfied.

9th Cir. R. 22-3(a).

In addition, the application must include copies of all relevant state court orders and decisions, if reasonably available to the appellant. *See* 9th Cir. R. 22-3(b).

If the appellant files a new application in this court for authorization to file a second or successive 28 U.S.C. § 2254 petition in the district court, the appellant must show:

- (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 factfinder would have found the appellant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2); *see also* 28 U.S.C. § 2244(b)(3).

The Clerk will serve the appellant with a copy of the standard form application for leave to file a second or successive petition.

If appellant files a standard application for authorization to file a second or successive 28 U.S.C. § 2254 habeas corpus petition, this court will assign a new case number to that application.

Any other pending motions are denied as moot.

DENIED.