FILED
United States Court of Appeals
Tenth Circuit

September 10, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

NOBLE LEROY JOHNSON,

Petitioner - Appellant,

v.

FNU PETERSON,

Respondent - Appellee.

No. 21-3119
(D.C. No. 5:21-CV-03135-SAC)
(D. Kan.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HARTZ**, **HOLMES**, and **CARSON**, Circuit Judges.

Noble Leroy Johnson, a Kansas prisoner proceeding pro se,[1] seeks to appeal the district court's dismissal of his 28 U.S.C. § 2254 petition. We deny Johnson's request for a certificate of appealability (COA) and dismiss this matter.

A jury convicted Johnson of two counts of first-degree murder in 1976. A Kansas court sentenced him to two concurrent life sentences. Johnson filed a § 2254 petition in

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] Because Johnson appears pro se, we construe his filings liberally but do not serve as his advocate. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

1997. The district court denied relief, and this court affirmed. *See Johnson v. McKune*, 288 F.3d 1187 (10th Cir. 2002).

In 2021, Johnson filed another § 2254 petition in the district court.[2] The district court dismissed the petition for lack of jurisdiction. Johnson seeks to appeal the dismissal.

Johnson must obtain a COA before he can appeal. *See* 28 U.S.C. § 2253(c)(1)(A); *Montez v. McKinna*, 208 F.3d 862, 867 (10th Cir. 2000) (holding "a state prisoner must obtain a COA to appeal the denial of a habeas petition . . . filed pursuant to § 2254 . . . whenever the detention complained of in the petition arises out of process issued by a State court" (brackets and internal quotation marks omitted)). To obtain a COA, Johnson must show "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) (emphasis added). Johnson has not met this burden.

"A district court does not have jurisdiction to address the merits of a second or successive . . . § 2254 claim until this court has granted the required authorization." *In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008) (per curiam). The district court

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[2] In his combined application for a certificate of appealability and opening brief, Johnson refers to his habeas petition as being filed under Fed. R. Civ. P. 60(b) and, alternatively, as being filed under Kan. Stat. Ann. § 60-1507. But the record confirms Johnson filed a "PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY." R. at 3. And Johnson does not argue the district court erred by construing his filing as a § 2254 petition. *See Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) ("[T]he omission of an issue in an opening brief generally forfeits appellate consideration of that issue.").

concluded that it lacked jurisdiction to consider Johnson's petition because it was second or successive and this court had not authorized it. Reasonable jurists could not debate the correctness of the district court's procedural ruling. We therefore deny Johnson's application for a COA, grant the motion to proceed without prepayment of costs of fees, and dismiss this matter.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

NOBLE LEROY JOHNSON,

Petitioner,

v. **CASE NO. 21-3135-SAC**

(fnu) PETERSON,

Respondent.

ORDER OF DISMISSAL

This matter is before the court on a petition for habeas corpus filed under 28 U.S.C. § 2254. Petitioner proceeds pro se.

The Court has examined the petition under Rule 4 of the Rules Governing Habeas Corpus and finds the present petition is a second or successive application for relief.

Background

Petitioner challenges his conviction in the District Court of Butler County, Kansas, in Case No. 1975-CR-8872. That conviction was the subject of an earlier habeas corpus petition filed in this court in Case No. 97-3269-DES. The court dismissed that matter, and the decision was affirmed on appeal. *Johnson v. McKune*, 288 F.3d 1187 (10th Cir. 2002).

Analysis

This matter is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). Under 28 U.S.C. § 2244(b), enacted as part of the AEDPA, "the filing of a second or successive § 2254 application is tightly constrained[]." *Case v. Hatch*, 731 F.3d 1015, 1026 (10th Cir. 2013). "Before a court can consider a second claim,

an applicant must first 'move in the appropriate court of appeals for an order authorizing the district court to consider the application.'" *Id.* (quoting 28 U.S.C. §2244 (b)(3)(A)). "Section 2244's gate-keeping requirements are jurisdictional in nature and must be considered prior to the merits of a § 2254 petition." *Id.* at 1027 (citing *Panetti v. Quarterman*, 551 U.S. 930, 942-47 (2007)); *see also In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008)("A district court does not have jurisdiction to address the merits of a second or successive … § 2254 claim until this court has granted the required authorization.").

Where, as here, a petitioner presents a successive petition without the prior authorization required by statute, the district court may consider whether the matter should be transferred to the court of appeals under 28 U.S.C. § 1631, rather than dismissed, if the transfer would be in the interest of justice. *See In re Cline*, 531 F.3d at 1252.

Because the petition does not clearly show the nature of petitioner's challenge based on actual innocence, the court concludes the present matter should be dismissed rather than transferred. The dismissal of this matter does not prevent petitioner from personally seeking authorization from the Tenth Circuit.

Finally, because this matter is dismissed for lack of jurisdiction, the Court declines to enter a certificate of appealability.

IT IS, THEREFORE, BY THE COURT ORDERED this matter is dismissed as a second or successive application for habeas corpus. No certificate of appealability will issue.

IT IS SO ORDERED.

DATED: This 2d day of June, 2021, at Topeka, Kansas.

S/ Sam A. Crow
SAM A. CROW
U.S. Senior District Judge

FILED
United States Court of Appeals
Tenth Circuit

September 24, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

NOBLE LEROY JOHNSON,

Petitioner - Appellant,

v.

FNU PETERSON,

Respondent - Appellee.

No. 21-3119
(D.C. No. 5:21-CV-03135-SAC)
(D. Kan.)

ORDER

Before **HARTZ**, **HOLMES**, and **CARSON**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk