

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

FILED
**United States Court of Appeals
Tenth Circuit**

February 6, 2023

**Christopher M. Wolpert
Clerk of Court**

CARL DEAN WYATT, JR.,

Petitioner - Appellant,

v.

SCOTT CROW,

Respondent - Appellee.

No. 22-6180
(D.C. No. 5:22-CV-00740-R)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **TYMKOVICH, KELLY**, and **ROSSMAN**, Circuit Judges.

Carl Dean Wyatt, Jr., is an Oklahoma prisoner serving a life sentence for a murder committed in 1997. He has filed multiple unsuccessful 28 U.S.C. § 2254 petitions challenging his conviction.

In August 2022, Wyatt filed a new § 2254 petition alleging new DNA evidence, and new evidence of prosecutorial misconduct. In October 2022, the district court dismissed that petition for lack of jurisdiction because it fell within the definition of “second or successive” and this court had not authorized Wyatt to bring his new claims. *See* 28 U.S.C. § 2244(b)(3)(A). Wyatt then filed a notice of appeal,

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

resulting in this proceeding (No. 22-6180). He also filed a motion for authorization to file his new § 2254 petition, creating another proceeding (No. 22-6201).

In December 2022, we denied Wyatt's motion for authorization, thus terminating No. 22-6201. But this proceeding remains, and the question before us is whether to issue a certificate of appealability (COA) so Wyatt may challenge the district court's decision to dismiss his § 2254 petition for lack of jurisdiction.

To merit a COA, Wyatt "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). And he must make an extra showing in this circumstance because the district court resolved his motion on a procedural basis, namely, lack of jurisdiction. So he must also show that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

Jurists of reason would not find the district court's procedural ruling debatable. This was not a situation where a prisoner filed a motion invoking some authority other than § 2254, thus requiring the district court to discern whether the motion was an attempt to avoid the statutory restrictions on second or successive § 2254 petitions. Wyatt explicitly filed a new § 2254 petition, yet without authorization. "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).

Wyatt does not argue otherwise. His application for a COA instead argues the substance of the claims he hopes to bring. Effectively, it is another motion for authorization, but on the same grounds we considered in No. 22-6201. It does not address the district court's procedural decision to dismiss for lack of jurisdiction.

For these reasons, we deny a COA. We grant Wyatt's motion to proceed without prepayment of costs or fees.

Entered for the Court

A handwritten signature in black ink, appearing to read 'C. M. Wolpert', with a long horizontal stroke extending to the right.

CHRISTOPHER M. WOLPERT, Clerk

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

CARL DEAN WYATT, JR.,)	
)	
Petitioner,)	
)	
v.)	No. CIV-22-740-R
)	
SCOTT CROW,)	
)	
Respondent.)	

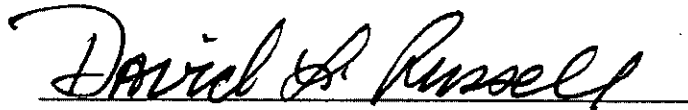
ORDER

Petitioner filed this action pursuant to 28 U.S.C. § 2254, seeking a writ of habeas corpus. Pursuant to 28 U.S.C. § 636(b)(1)(B) and (C) the matter was referred to United States Magistrate Judge Suzanne Mitchell for preliminary review. On September 20, 2022, Judge Mitchell issued a Report and Recommendation wherein she recommended that the Court dismiss the petition for lack of jurisdiction because the petition is second or successive. (Doc. No. 7). The matter is currently before the Court on Petitioner's timely objection to the Report and Recommendation, which gives rise to the Court's obligation to undertake a *de novo* review of Petitioner's specific objections thereto. Having conducted such review, the Court finds as follows.

Petitioner argues that this Court may permit his habeas petition to proceed in the interest of justice. The Court, however, cannot permit a second or successive petition to proceed in the absence of authorization from the Court of Appeals for the Tenth Circuit. 28 U.S.C. § 2244(b)(3)(A). Judge Mitchell's conclusion that this Court lacks jurisdiction does not address the merits of Petitioner's claims nor does it consider the deference

afforded to certain findings by the Oklahoma Court of Criminal Appeals under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), the issues addressed by Petitioner's objection. Simply stated, the Court may not address those issues until Petitioner obtains permission from the Court of Appeals to pursue a successive petition. Petitioner's objection does not address the issues set forth in the Report and Recommendation and accordingly, the Report and Recommendation is hereby ADOPTED IN ITS ENTIRETY. The Petition is DISMISSED FOR LACK OF JURISDICTION.¹

IT IS SO ORDERED this 11th day of October 2022.


DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

¹ The Court further finds Petitioner has not shown "at least, 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 [this] court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). *See also* 28 U.S.C. § 2253(c). Therefore, Petitioner is denied a certificate of appealability. *See* Rule 11(a) of the Rules Governing Section 2254 Cases.

I. Procedural history.

An Oklahoma County court convicted Petitioner of first-degree murder and conspiracy to commit robbery with a firearm in Case No. CF-1997-424; Doc. 1, at 1. The state court sentenced him to consecutive sentences of life imprisonment without parole for the murder and sixty years' imprisonment for the conspiracy. *Id.*

Petitioner has filed two prior habeas corpus actions in this Court. In Case No. CIV-00-1326-R, Petitioner challenged his convictions and sentences in Case No. CF-1997-424. *See Wyatt v. Fatkin*, No. CIV-00-1326-R, Doc. 1 (W.D. Okla. July 31, 2000) (*Wyatt I*). United States Magistrate Judge Valerie K. Couch recommended the Court deny the petition on the merits in a Report and Recommendation issued April 25, 2001. *See id.* at Doc. 14 (W.D. Okla. Apr. 25, 2001).² After reviewing de novo the pleadings, including Petitioner's objection to the Report and Recommendation, United States District Judge David L. Russell adopted the Report and Recommendation, denied the petition for writ

² Petitioner raised five grounds for relief. In Ground One, Petitioner alleged the state denied him a fair trial when the trial court failed to instruct the jury on corroboration of accomplice testimony. *Wyatt I*, Doc. 14, at 2. In Ground Two, Petitioner alleged the state trial court erred when it failed to determine whether a conspiracy existed before allowing the prosecution to proceed with its case. *Id.* In Ground Three, Petitioner alleged the jury was not fully informed of the "deals" his co-defendants made with the prosecution in exchange for their cooperation. *Id.* In Ground Four, Petitioner alleged his trial counsel was ineffective. *Id.* And, in Ground Five, Petitioner alleged his sentences were excessive. *Id.*

of habeas corpus, and denied Petitioner a certificate of appealability. *See Wyatt I*, Doc. 22 (W.D. Okla. Dec. 21, 2001) & Doc. 26 (W.D. Okla. Feb. 13, 2002). Petitioner appealed the denial of his petition to the Tenth Circuit, which denied him a certificate of appealability on August 4, 2003. *Wyatt v. Fatkin*, No. 02-6039 (10th Cir. Aug. 4, 2003) (*Wyatt II*).

In Case No. CIV-07-681-R, Petitioner filed a second habeas corpus petition challenging his Oklahoma County convictions and sentences in Case No. CF-1997-424. *Wyatt v. Sirmons*, No. CIV-07-681-R, 2007 WL 2693042, at *1 (W.D. Okla. Sept. 10, 2007) (*Wyatt III*). He alleged in that petition that his trial counsel had been ineffective at Petitioner's trial and that, since his trial, the Oklahoma Court of Criminal Appeals (OCCA) had reversed some of his trial counsel's other criminal cases and his trial counsel was disbarred in 2003. *Id.* at *1. Magistrate Judge Doyle W. Argo conducted an initial review of the petition and determined the Court lacked jurisdiction to consider it because it was a second or successive petition that Petitioner had filed without the Tenth Circuit's authorization. *Id.* at *1-2. Judge Argo recommended the Court transfer the petition to the Tenth Circuit under 28 U.S.C. § 1631. *Id.* Judge Russell reviewed the case de novo, adopted the Report and Recommendation, and transferred the petition to the Tenth Circuit. *Id.* at *1. The Tenth Circuit then denied Petitioner authorization to file a second or successive habeas corpus petition. *In re Carl Dean Wyatt*, No. 07-6216, at 2-3 (10th Cir. Oct. 12,

A. Petitioner did not move for or receive the Tenth Circuit court's authorization before filing this habeas corpus petition.

Petitioner seeks to have this Court undertake another review of the merits of his murder and conspiracy convictions. Doc. 1. But because Petitioner previously challenged his state court convictions and sentences in this Court, he needs authorization from the Tenth Circuit to file a second or successive § 2254 habeas petition. See 28 U.S.C. § 2244(b)(3)(A) ("Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application:"). Petitioner has not confirmed he received prior authorization from the Tenth Circuit to file this second or successive habeas petition, nor has the undersigned determined that he has received such authorization. The Court, thus, has no jurisdiction to entertain Petitioner's habeas corpus petition. *In re Cline*, 531 F.3d at 1251.

B. The Court should dismiss the habeas corpus petition, rather than transfer it to the Tenth Circuit Court of Appeals.

A district court may either dismiss or transfer an unauthorized second or successive § 2254 habeas application. *In re Cline*, 531 F.3d at 1252. Under 28 U.S.C. § 1631, if a district court determines that it lacks jurisdiction, it "shall, if it is in the interest of justice, transfer such action or appeal to any other such court . . . in which the action or appeal could have been brought."

Factors the Court considers “in deciding whether a transfer is in the interest of justice include whether the claims would be time barred if filed anew in the proper forum, whether the claims alleged are likely to have merit, and whether the claims were filed in good faith or if, on the other hand, it was clear at the time of filing that the court lacked the requisite jurisdiction.” *In re Cline*, 531 F.3d at 1251 (citing *Trujillo v. Williams*, 465 F.3d 1210, 1223 n.16 (10th Cir. 2006)). “Where there is no risk that a meritorious successive claim will be lost absent a § 1631 transfer, a district court does not abuse its discretion if it concludes it is not in the interest of justice to transfer the matter . . . for authorization.” *Id.* at 1252; *see also Trujillo*, 465 F.3d at 1222-23.

Transferring this case to the Tenth Circuit is not in the interest of justice. Petitioner asserts he has new timely claims (raised in state post-conviction proceedings and examined in a state court evidentiary hearing), which were resolved against him on June 10, 2022. Doc. 1, at 52. If these claims were to meet the standards required for authorization, then they would not be at risk for a time bar. *See, e.g.*, 28 U.S.C. § 2244(3)(D) (“The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.”); *see also Johnson v. Allbaugh*, 742 F. App’x 395, 396 n.2 (10th Cir. 2018) (noting that the Tenth Circuit will grant authorization “only if he is able to demonstrate that he has new claims” that meet the statutory requirements under 28 U.S.C. § 2244(b)(2)(A)-(B)). Yet

Petitioner has neither sought authorization nor argued that his claims meet the authorization standards of 28 U.S.C. § 2244(b). The “second or successive authorization requirements are no longer new, and it is by now well-established that under the plain language of . . . [§]2244(b)(3), prisoners must first obtain circuit-court authorization before filing a second or successive habeas claim in district court.” *In re Cline*, 531 F.3d at 1252. Petitioner is aware of this requirement because he sought to file a second habeas corpus action in 2007 without authorization, which the Tenth Circuit ultimately denied. Under such circumstances, the undersigned concludes Petitioner’s unauthorized filing, in a court he knew lacked the requisite jurisdiction to consider his petition, was not made in good faith. *See id.* (explaining that because “courts ha[d] “repeatedly explained to [petitioner] the statutory requirements of §§ 2255(h) and 2244(b),” “a district court might well conclude that his most recent unauthorized filing was not made in good faith”).

Because dismissal of this action will not result in the loss of any meritorious claims, the Court should therefore dismiss it without prejudice rather than transfer it to the Tenth Circuit.

III. Recommendation and notice of right to object.

For the reasons set forth above, the undersigned recommends dismissal without prejudice of this habeas petition for lack of jurisdiction as a second or successive habeas petition without Tenth Circuit authorization. Doc. 1. The


Court should also deny as moot Petitioner's "Motion to Exceed the Thirty Page Limit." Doc. 2.

The undersigned advises Petitioner of his right to file an objection to this Report and Recommendation with the Clerk of this Court on or before **October 11, 2022**, in accordance with 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b)(2). The undersigned further advises Petitioner that failure to make a timely objection to this Report and Recommendation waives the right to appellate review of both factual and legal questions contained herein. See *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

This Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in this matter.

ENTERED this 20th day of September, 2022.

ENTERED BY CLERK OF COURT


SUZANNE MITCHELL
UNITED STATES MAGISTRATE JUDGE

CLERK OF COURT

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**Additional material
from this filing is
available in the
Clerk's Office.**