UNITED STATES COURT OF APPE

FOR THE TENTH CIRCUIT

TRACY J. McGILL,

Petitioner - Appellant,

v.

WILLIAM RANKIN,

Respondent - Appellee.

No. 23-5014
(D.C. No. 4:23-CV-00010-JFH-SH)
(N.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **TYMKOVICH**, **EBEL**, and **CARSON**, Circuit Judges.

Tracy J. McGill, proceeding pro se, seeks a certificate of appealability (COA) to appeal from the district court's order dismissing his fifth 28 U.S.C. § 2254 habeas application for lack of jurisdiction as an unauthorized successive application. We deny a COA and dismiss this matter.

I. Background

In 2001, Mr. McGill pled guilty in Oklahoma state court to two counts of first-degree murder. He was sentenced to two concurrent life sentences. A few months

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

later, he moved to withdraw his guilty plea. The trial court denied the motion, and the Oklahoma Court of Criminal Appeals affirmed the trial court's decision.

In 2006, Mr. McGill filed his first § 2254 habeas application, which the district court dismissed as time-barred. He filed additional § 2254 applications in 2012, 2016, and 2018. The district court dismissed the 2012 application for failure to prosecute, and it dismissed the 2016 and 2018 applications as unauthorized successive applications.

In 2023, Mr. McGill filed his fifth § 2254 habeas application. In it, he relied on *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), to claim that the State of Oklahoma lacked jurisdiction to prosecute him because the federal government has exclusive jurisdiction to prosecute crimes committed by Indians in Indian Country. Because he did not receive authorization from this court to file a successive § 2254 habeas application, the district court dismissed it for lack of jurisdiction. Mr. McGill now seeks a COA to appeal from the district court's dismissal order.

II. Discussion

To obtain a COA where, as here, a district court has dismissed a filing on procedural grounds, Mr. McGill must show both "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). We need not

address the constitutional question if we conclude that reasonable jurists would not debate the district court's resolution of the procedural one. *Id.* at 485.

A state prisoner, like Mr. McGill, may not file a second or successive § 2254 habeas application unless he first obtains an order from the circuit court authorizing the district court to consider the motion. 28 U.S.C. § 2244(b)(3)(A). Absent such authorization, a district court lacks jurisdiction to address the merits of a second or successive § 2254 habeas application. *In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008).

Mr. McGill does not dispute that he previously filed a § 2254 application challenging the same convictions. The district court's dismissal of that application as time-barred constitutes a merits decision, and "any later habeas petition challenging the same conviction[s] is second or successive and is subject to the [Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)] requirements." *In re Rains*, 659 F.3d 1274, 1275 (10th Cir. 2011).

Under AEDPA, Mr. McGill must receive authorization from this court before he may proceed with his successive § 2254 habeas application, *see* § 2244(b)(3)(A), but he does not contend that this court granted him the requisite authorization. Instead, Mr. McGill argues that the district court erred in characterizing his § 2254 application as a second or successive application that is subject to § 2244(b)(3)(A)'s authorization requirement. To support his argument, he relies primarily on *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), and *Stanko v. Davis*, 617 F.3d 1262 (10th Cir. 2010). But neither of these cases demonstrate that the district court erred in

treating Mr. McGill's fifth habeas application as a second or successive application and dismissing it for lack of jurisdiction.

Stanko is inapposite because it involved a federal prisoner seeking to challenge the execution of his federal sentence by bringing a second 28 U.S.C. § 2241 petition, which is governed by a different statutory section. *See Stanko*, 617 F.3d at 1266 (explaining that "[t]he statutory limitations on a federal inmate's ability to file multiple § 2241 petitions are contained in 28 U.S.C. § 2244(a)"). Interpreting § 2244(a), not § 2244(b), we concluded that "Mr. Stanko was not required . . . to obtain circuit authorization before filing his § 2241 petition." *Stanko*, 617 F.3d at 1269. *Stanko* did not address the circumstances at issue here involving a state prisoner filing his fifth § 2254 habeas application, which is governed by the provisions in § 2244(b).

Martinez-Villareal is also inapplicable to Mr. McGill's circumstances. In *Martinez-Villareal*, the Court

> held that the claim of a capital prisoner that he was insane and therefore could not be put to death was necessarily unripe until the State issued a warrant for his execution, and so the prisoner's subsequent request for consideration of that previously unripe claim was not "second or successive" for purposes of § 2244(b).

Burton v. Stewart, 549 U.S. 147, 154-55 (2007). In *Burton,* which the district court cited in its dismissal order here, the Court explained that *Martinez-Villareal* was "readily distinguishable" because unlike Mr. Burton—and Mr. McGill—the prisoner in *Martinez-Villareal* "had attempted to bring [the] claim in his initial habeas petition," and the Court "expressly declined to address the situation where a petitioner fails to raise the claim in the initial petition." *Id.*

The Court explained that Mr. Burton's 2002 habeas application was a second or successive habeas application because he was being held in state custody pursuant to a 1998 judgment, which was the same judgment he challenged in his first habeas application and in his 2002 application. *Id.* at 153. "In short, Burton twice brought claims contesting the same custody imposed by the same judgment of a state court." *Id.* "As a result, under AEDPA, he was required to receive authorization from the Court of Appeals before filing his second challenge. Because he did not do so, the District Court was without jurisdiction to entertain it." *Id.*

The same holds true for Mr. McGill. His 2023 habeas application is a second or successive application because it contests the same custody imposed by the same state-court judgment that he challenged in his first habeas application. Although he contends that the claim he now seeks to bring presents "a novel issue, and was not readily available to [him] during his previous habeas petitions," COA Appl. at 4, that does not change the fact that he needs authorization to bring it. AEDPA specifically contemplates a situation where a prisoner discovers a new claim after he files his first habeas application and still requires circuit-court authorization for the second or successive habeas application to proceed. *See* 28 U.S.C. § 2244(b)(2) ("A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless" it meets certain statutory requirements); § 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.").

Moreover, it is not accurate for Mr. McGill to assert that his jurisdictional claim is novel or was previously unavailable. Although *McGirt* had not been issued when Mr. McGill filed his first habeas application, nothing prevented him from making the same argument that Mr. McGirt made in attacking his conviction—that the state lacked jurisdiction to try him because he was an Indian who committed a crime in Indian country.[1]

Because Mr. McGill did not receive the requisite circuit-court authorization before filing his fifth § 2254 habeas application, he has failed to show that jurists of reason would debate the correctness of the district court's procedural ruling dismissing his application for lack of jurisdiction. Accordingly, we deny a COA and dismiss this matter. We grant Mr. McGill's motion for leave to proceed without prepayment of costs or fees.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

[1] We note that another Oklahoma prisoner also successfully made the same argument as Mr. McGirt, which the Supreme Court recognized in its decision. *See McGirt*, 140 S. Ct. at 2460 ("While Oklahoma state courts have rejected any suggestion that the lands in question remain a reservation, the Tenth Circuit has reached the opposite conclusion." (citing *Murphy v. Royal*, 875 F.3d 896, 907-09, 966 (10th Cir. 2017)). In *Murphy*, we issued a writ of habeas corpus after agreeing with the petitioner that he should not have been tried in state court but instead "should have been tried in federal court because he is an Indian and the offense occurred in Indian country." 875 F.3d at 903.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TRACY J. McGILL,

Petitioner,

v.

WILLIAM RANKIN,

Respondent.

Case No. 23-CV-0010-JFH-SH

ORDER

Petitioner Tracy McGill, a self-represented Oklahoma prisoner, initiated this action by filing a Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 by a Person in State Custody on January 9, 2023 ("Petition"). Dkt. No. 1. McGill did not pay the filing fee necessary to commence this action or request leave of Court to proceed without prepayment. In an Order filed January 24, 2023 [Dkt. No. 2], the Court directed McGill to cure the filing fee deficiency on or before February 14, 2023. However, on preliminary screening of the Petition, the Court concludes that the Petition shall be DISMISSED, without prejudice, for lack of jurisdiction.

A district court is required to "promptly examine" a § 2254 petition and the court must dismiss the petition "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court." Rule 4, *Rules Governing Section 2254 Cases in the United States District Courts*. Here, it is plainly apparent that the Petition is an unauthorized successive § 2254 petition and that this Court therefore lacks jurisdiction to adjudicate the Petition.

The Petition is McGill's fifth § 2254 petition challenging the criminal judgment entered against him in Tulsa County District Court Case No. CF-2000-4326. *See McGill v. State of Oklahoma*, Case No. 18-CV-0446-CVE-JFJ (N.D. Okla. 2018) (dismissing § 2254 petition as

unauthorized successive petition); *McGill v. Patton*, Case No. 16-CV-0023-CVE-PJC (N.D. Okla. 2016) (dismissing § 2254 habeas petition as unauthorized successive petition); *McGill v. Chester*, Case No. 12-CV-0404-GKF-tlw (N.D. Okla. 2012) (dismissing § 2254 habeas action for lack of prosecution); *McGill v. Okla. Dep't of Corr.*, Case No. 07-CV-0041-TCK-PJC (N.D. Okla. 2007) (dismissing § 2254 petition as time-barred and entering judgment in favor of respondent). This time, relying on *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), McGill claims the State of Oklahoma lacked jurisdiction to prosecute him because he is "a 'native Indian,'" and he was therefore subject to federal prosecution, under the Major Crimes Act, 18 U.S.C. § 1153, for crimes he committed in Indian country. Dkt. No. 1 at 4, 13, 15-17.

Because McGill challenges the same state-court judgment he challenged through prior § 2254 petitions and the dismissal of McGill's first habeas petition as time-barred was a merits decision, the Petition is a successive petition governed by 28 U.S.C. § 2244(b). *See Burton v. Stewart*, 549 U.S. 147, 153 (2007) (concluding second-in-time habeas petition was "second or successive" under 28 U.S.C. § 2244(b) because state prisoner "twice brought claims contesting the same custody imposed by the same judgment of a state court"); *In re Rains*, 659 F.3d 1274, 1275 (10th Cir. 2011) (joining several other circuits in holding that "[t]he dismissal of [petitioner's] first habeas petition as time-barred was a decision on the merits, and any later habeas petition challenging the same conviction is second or successive and is subject to [§ 2244(b)'s] requirements"). Under § 2244(b)(3)(A), a petitioner must obtain authorization from the appropriate court of appeals before filing a successive petition. *See In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008) (*per curiam*) ("A district court does not have jurisdiction to address the merits of a second or successive . . . § 2254 claim until [the court of appeals] has granted the required authorization.").

McGill asserts that "this is not a second and successive [petition] because [the] remedy/claim was unavailable." Dkt. No. 1 at 7. And he concedes in the Petition that he did not obtain the requisite authorization before he filed the Petition. *Id.* That concession alone supports dismissal of the Petition for lack of jurisdiction. But the Court also takes judicial notice of the docket sheet in *McGill v. Okla. Dep't of Corr.*, Case No. 07-CV-0041-TCK-PJC (N.D. Okla. 2007), showing that McGill filed a motion in the United States Court of Appeals for the Tenth Circuit requesting leave to file a successive petition, asserting the same claim he raises in the Petition, only a few days after he filed the Petition. On January 24, 2023, the Tenth Circuit denied that request. *See* Dkt. No. 38, *McGill v. Okla. Dep't of Corr.*, Case No. 07-CV-0041-TCK-PJC (N.D. Okla. 2007). The Court therefore DISMISSES the Petition for lack of jurisdiction. And, because reasonable jurists would not debate the Court's conclusion that the Petition is an unauthorized successive petition over which this Court lacks jurisdiction, the Court also DENIES a certificate of appealability. *See* 28 U.S.C. 2253(c); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

THEREFORE, IT IS ORDERED that:

1. McGill's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 by a Person in State Custody filed January 9, 2023 ("Petition") [Dkt. No. 1] is DISMISSED without prejudice as an unauthorized successive petition.
2. A certificate of appealability is DENIED.
3. A separate judgment shall be entered in this matter.

Dated this 26th day of January, 2023.

JOHN F. HEIL, III
UNITED STATES DISTRICT JUDGE