United States Court of Appeals for the Fifth Circuit

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Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

No. 21-10662

United States Court of Appeals
Fifth Circuit
FILED
August 20, 2021
Lyle W. Cayce
Clerk

IN RE: JOSHUA GEORGE NOWLAND,

Movant.

Motion for an order authorizing
the United States District Court for the
Northern District of Texas to consider
a successive 28 U.S.C. § 2254 application

Before STEWART, HAYNES, and HO, *Circuit Judges.*

PER CURIAM:

Joshua George Nowland, Texas prisoner # 01872681, seeks authorization to file a second or successive 28 U.S.C. § 2254 application. Nowland is currently serving a 28-year sentence for aggravated robbery. In the district court, Nowland invoked 28 U.S.C. § 2244, seeking to raise claims that his constitutional rights to proceed pro se and to the effective assistance of trial and appellate counsel were violated; his case should be dismissed for a violation of his speedy trial rights and, alternatively, that he be granted a new trial or new sentencing because of jury misconduct; COVID-19 orders issued by state judges violated article 11.07 of the Texas Code of Criminal Procedure; and a state judge should be prosecuted for forgery in connection with his state habeas application. The district court transferred the application to this court. Nowland argues that he is actually innocent and that the district court erred in failing to find that he made a prima facie

showing that he is entitled to file a second habeas application raising his proposed claims.

Nowland's claims surrounding alleged defects in his state habeas proceedings are not cognizable on federal habeas review. *See In re Gentras*, 666 F.3d 910, 911 (5th Cir. 2012).[1] Further, because Nowland's proposed claims surrounding his aggravated robbery conviction existed when he filed his initial § 2254 application, they were successive, and the district court lacked jurisdiction to consider them. *See Leal Garcia v. Quarterman*, 573 F.3d 214, 219, 222 (5th Cir. 2009).

Before a prisoner may file a second or successive § 2254 application in the district court, this court must find that he has made "a prima facie showing that the application satisfies the requirements" of § 2244(b). § 2244(b)(3)(C). We do not consider a claim that was asserted in a previous application. *See* § 2244(b)(1); *In re Flowers*, 595 F.3d 204, 205 (5th Cir. 2009). For a claim not presented in a prior application, the applicant must show that 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," § 2244(b)(2)(A), or that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" and "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 applicant guilty of the underlying offense," § 2244(b)(2)(B).

To the extent Nowland seeks to raise speedy trial and jury misconduct claims, we will not consider them because he raised them in his initial § 2254

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[1] As a result, we cannot address the alleged forgery.

application. *See* § 2244(b)(1); *Flowers*, 595 F.3d at 205. With respect to his newly raised claims that he was denied his right to proceed pro se and the effective assistance of trial and appellate counsel, Nowland neither identifies a new rule of constitutional law nor a newly discovered factual predicate sufficient to show that no reasonable factfinder would have convicted him.

Further, Nowland's vague, conclusory reference to his actual innocence fails to satisfy § 2244(b)(2). To the extent he seeks to raise a freestanding claim of actual innocence, such claims are not cognizable on federal habeas review. *See In re Swearingen*, 556 F.3d 344, 348 (5th Cir. 2009). Finally, even if a showing of actual innocence could serve as a gateway to raise successive claims without satisfying the § 2244(b) requirements, Nowland has not shown that "it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). 115 S.Ct 851

Because he fails to make the requisite showing, IT IS ORDERED that Nowland's motion for authorization to file a successive § 2254 application is DENIED.