

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

May 30, 2023

Christopher M. Wolpert
Clerk of Court

ROBERT L. SMALLEN,

Petitioner - Appellant,

v.

SCOTT NUNN, Warden,

Respondent - Appellee.

No. 22-7042
(D.C. No. 6:21-CV-00364-RAW-KEW)
(E.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HARTZ, BACHARACH, and PHILLIPS**, Circuit Judges.

Robert L. Smallen, proceeding pro se, seeks a certificate of appealability (COA) to appeal from the district court’s order dismissing his second 28 U.S.C. § 2254 habeas petition for lack of jurisdiction as an unauthorized successive petition. We deny a COA and dismiss this matter.

An Oklahoma jury found Mr. Smallen guilty of first-degree murder and he was sentenced to life in prison. The Oklahoma Court of Criminal Appeals affirmed. Mr. Smallen filed his first § 2254 habeas petition in 2016, which the district court denied. He did not appeal the district court’s decision.

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

In 2021, Mr. Smallen filed a second § 2254 habeas petition on the district court's form, which is titled "PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY." R. at 5. In the petition, he asserted two claims: 1) Oklahoma lacked jurisdiction to prosecute him because he is an Indian and the crime occurred in Indian Country, *see id.* at 9; and 2) he received ineffective assistance of counsel, *id.* at 11. At the end of his petition, when asked what relief he wanted the court to grant, he wrote "Habeas Corpus." *Id.* at 15.

The government filed a motion to dismiss the petition for lack of jurisdiction because Mr. Smallen had not obtained authorization from this court to file a second or successive § 2254 habeas petition. The district court granted the government's motion to dismiss. Mr. Smallen now seeks a COA to appeal from the district court's order.

To obtain a COA where, as here, a district court has dismissed a filing on procedural grounds, Mr. Smallen 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. Smallen, 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. Smallen contends that he did not file a “habeas corpus petition” but instead used the “habeas corpus form to ask the federal court to grant[,] sua sponte, a writ of prohibition.” COA Appl. at 1. He therefore asserts that the district court misconstrued his request, *see id.* at 4, and “inadvertently denied [his] request for [a] writ of prohibition,” *id.* at 3. In support of his argument, he cites to an attachment to his COA application. *See id.* at 3, 4. That attachment is titled “(Proof of Lower Court’s Usurpation of Power) (Writ of Prohibition).” *Id.*, Attach. at 1. But the document Mr. Smallen has attached to his COA application does not bear any markings that it was filed in district court, and it does not appear anywhere in the district court record. In addition, at the end of the document there is no signed or dated signature page or any statement showing this document was submitted for filing or served on the warden. Because we see no evidence that the document attached to Mr. Smallen’s COA application was ever filed in district court, he has not advanced a legitimate basis for challenging the district court’s procedural ruling.

Mr. Smallen has failed to show that jurists of reason would debate the correctness of the district court’s procedural ruling dismissing his second § 2254 habeas petition for lack of jurisdiction. Accordingly, we deny a COA and dismiss this matter.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk