

September 10, 2008

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUITElisabeth A. Shumaker
Clerk of Court

In re:

DAVID C. JOHNSTON,

Movant.

No. 08-7082

ORDER

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

David C. Johnston seeks authorization to file a second or successive application for habeas corpus relief under 28 U.S.C. § 2254. Our review indicates that he has filed only one prior § 2254 application, which was dismissed without prejudice to allow him to pursue state remedies for certain unexhausted claims. *See Johnston v. Higgins*, No. 05-CV-00358-JHP-KEW (E.D. Okla. Nov. 20, 2006) (minute order). Because his first application was dismissed without prejudice and without adjudication, his new filing does not count as “second or successive” for purposes of 28 U.S.C. § 2244(b), and he is not required to obtain this court’s authorization to file his new § 2254 application in the district court. *See Slack v. McDaniel*, 529 U.S. 473, 485-86 (2000) (“A habeas petition filed in the district court after an initial habeas petition was unadjudicated on its merits and dismissed for failure to exhaust state remedies is not a second or successive

petition.”); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998) (“[N]one of our cases . . . have ever suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and who then did exhaust those remedies and returned to federal court, was by such action filing a successive petition. A court where such a petition was filed could adjudicate these claims under the same standard as would govern those made in any other first petition.”).

Because Mr. Johnson does not require authorization to file his § 2254 application, the motion for authorization is DISMISSED.

Entered for the Court

A handwritten signature in dark ink, reading "Elisabeth A. Shumaker", with a long, sweeping horizontal line extending to the right.

ELISABETH A. SHUMAKER, Clerk