

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

September 9, 2019

Elisabeth A. Shumaker
Clerk of Court

In re: JONATHAN N. ESTES,

Movant.

No. 19-1312
(D.C. No. 1:16-CV-00141-WJM-MEH)
(D. Colo.)

ORDER

Before **HOLMES**, **BACHARACH**, and **MORITZ**, Circuit Judges.

Jonathan N. Estes, a Colorado state prisoner proceeding pro se, moves for authorization to file a second or successive 28 U.S.C. § 2254 habeas application challenging his 2006 convictions on charges of attempted first degree murder and attempted robbery. The district court has stayed Estes' first § 2254 application because he failed to exhaust his state remedies on all of the claims he asserted. Because his first habeas application has not been decided on the merits and the district court has not denied him leave to amend, Estes' new claims would not be deemed an unauthorized second or successive application if filed in the district court. Consequently, we deny his motion for authorization as unnecessary.

Estes filed a § 2254 habeas application in 2016 raising claims alleging ineffective assistance of counsel (IAC). In 2017, the district court ruled that some of his claims had not been exhausted. It stayed the § 2254 proceedings to allow Estes to return to state court to exhaust all of his IAC claims. *See Rhines v. Webber*, 544 U.S. 269, 277-78 (2005) (outlining circumstances under which a district court may stay a mixed application

while the prisoner exhausts claims in state court). Estes' post-conviction proceedings to exhaust his IAC claims remain pending in the state trial court, where an evidentiary hearing is scheduled in October 2019.

Estes seeks authorization to file claims asserting that the state court's failure to allow his post-conviction counsel to withdraw due to a conflict of interest and the court's inordinate delay in deciding his post-conviction claims have prejudiced his claims and denied him meaningful access to the courts. For this court to authorize a second or successive § 2254 habeas application, a prisoner must satisfy the gate-keeping requirements in 28 U.S.C. § 2244(b). Estes maintains that his new proposed claims rely on newly discovered factual predicates. *See id.* § 2244(b)(2)(B). But in light of his pending *first* § 2254 application, we initially consider whether authorization under § 2244(b)(2) is necessary.

"The phrase 'second or successive . . .' is a term of art given substance in [the Supreme Court's] prior habeas corpus cases." *Slack v. McDaniel*, 529 U.S. 473, 486 (2000). And not every second-in-time § 2254 application challenging the same conviction requires authorization under 28 U.S.C. § 2244(b). In particular, a prisoner's first § 2254 application must have been adjudicated on the merits for a subsequent application to be considered second or successive. *See Slack*, 529 U.S. at 487 (holding a habeas application filed after the prisoner's first application was dismissed for failure to exhaust is not second or successive). Here, instead of dismissing Estes' mixed application, the district court stayed his § 2254 proceedings pending his exhaustion of his state-court remedies. The state court post-conviction proceedings are ongoing and the

district court case remains stayed. Thus, the district court has not yet adjudicated Estes' claims in his first § 2254 application on the merits.

The district court has also not denied with prejudice leave to amend Estes' § 2254 application to add his proposed new claims. In *United States v. Trent*, 884 F.3d 985, 993 (10th Cir.), *cert. denied*, 139 S. Ct. 615 (2018), we held “that a prejudgment request to add a claim to a [28 U.S.C.] § 2255 motion is not a second or successive motion; it is a motion to amend and should be considered under Federal Rule of Civil Procedure 15.” However, once a court has denied such a motion with prejudice, *e.g.*, as untimely in *Trent*, the claims may only be pursued in a second or successive application, over which the district court lacks jurisdiction absent our authorization. *See id.* at 994.

Here, Estes does not contend that the district court has denied with prejudice a motion to amend his § 2254 application to add the claims he presents in his motion for authorization. We note several filings by Estes in the district court, while his § 2254 proceedings have been stayed, in which he sought to supplement his application with claims that are similar to those in his motion for authorization. But to date, the district court has either not ruled on these requests or has denied them without prejudice in light of the stay. Thus, at this juncture a motion to amend Estes' § 2254 application to raise his proposed new claims would not be “second or successive” and therefore would not require this court's authorization.

We deny Estes' motion for authorization as unnecessary. In doing so, we express no opinion on the merits of his new claims or whether his pending § 2254 application is subject to amendment to add these claims. This denial of authorization “shall not be

appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.” 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a long horizontal flourish.

ELISABETH A. SHUMAKER, Clerk