

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

September 7, 2023

Christopher M. Wolpert
Clerk of Court

In re: JOSEPH ALLEN BROWN,

Movant.

No. 23-5089
(D.C. No. 4:19-CV-00014-TCK-JFJ)
(N.D. Okla.)

ORDER

Before **McHUGH**, **MORITZ**, and **CARSON**, Circuit Judges.

Joseph Allen Brown, a state inmate proceeding pro se, seeks authorization to file a second or successive habeas application under 28 U.S.C. § 2254. Because he has not met the requisite conditions for authorization under 28 U.S.C. § 2244(b), we deny authorization.

Mr. Brown was convicted in Oklahoma state court of first-degree murder and reckless conduct with a firearm and was sentenced to life imprisonment. On direct appeal, he argued that one of the jurors was statutorily ineligible to serve as a juror in a criminal case, and that the trial court should have struck the juror for cause sua sponte. He also claimed his attorney was ineffective for failing to seek the juror's removal from the panel. The Oklahoma Court of Criminal Appeals (OCCA) rejected both claims and affirmed his conviction.

Mr. Brown then filed a pro se application for post-conviction relief in state court, renewing his argument that the juror was improperly seated and claiming appellate

counsel was ineffective for failing to adequately present the issue. The state trial court denied his application and the OCCA affirmed.

Having failed to obtain relief in state court, Mr. Brown filed a § 2254 application in district court, raising several issues surrounding the disqualified juror issue. As pertinent here, he argued that his conviction and sentence should be vacated because (1) the state trial court's failure to ensure that only qualified jurors were seated deprived the court of jurisdiction to convict and sentence him; (2) seating the juror violated his constitutional right to a twelve-person jury; (3) the trial judge and OCCA were biased and incompetent; and (4) appellate counsel was ineffective for, among other things, failing to raise the jurisdictional issue and to argue that the juror's seating constituted structural error. The district court denied his application and denied a certificate of appealability (COA). This court denied his application for a COA. *See Brown v. Dowling*, No. 22-5021, Order at 13 (10th Cir. Dec. 6, 2022).

Mr. Brown now seeks authorization to file a second or successive § 2254 application in district court, asserting claims that (1) the seating of the allegedly disqualified juror resulted in "structural error, jurisdictional defect, and void judgment," Mot. for Authorization at 8; (2) the alleged structural error and jurisdictional defect violated his "6th and 14th Amendment right to [a] jury of 12 qualified jurors," *id.* at 9 (initial capitalization omitted); and (3) the "trial judge was either bias[ed] or incompetent," *id.* at 10 (initial capitalization omitted). The proposed district court application he attached to his motion for authorization elaborates on those claims.

To obtain authorization, Mr. Brown must make a prima facie showing that his second or successive § 2254 application meets the gate-keeping requirements of § 2244(b)(2). *See* 28 U.S.C. § 2244(b)(3)(C); *Case v. Hatch*, 731 F.3d 1015, 1027-29 (10th Cir. 2013). We may authorize a claim only if he has not raised it in a previous § 2254 habeas application. *See* 28 U.S.C. § 2244(b)(1). And we may not authorize a new claim unless he shows that the claim relies on either newly discovered facts demonstrating his innocence or a new rule of constitutional law that the Supreme Court has made retroactively applicable to cases on collateral review. *See id.* § 2244(b)(2).

Mr. Brown’s proposed claims do not meet any of these requirements. His proposed claims are not new—he raised them in his first § 2254 application. They are also not based on new facts, much less new facts that would demonstrate his factual innocence. Finally, he has identified no new retroactively-applicable rule of constitutional law—and we are not aware of any—that supports his proposed claims.

Because Mr. Brown has not met the standards for authorization in § 2244(b), we deny his motion. 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 black ink, appearing to read 'C. Wolpert', with a long horizontal stroke extending to the right.

CHRISTOPHER M. WOLPERT, Clerk