

UNITED STATES COURT OF APPEALS **October 14, 2008**
FOR THE TENTH CIRCUIT
Elisabeth A. Shumaker
Clerk of Court

In re:

JAY D. BREAZEALE,

Movant.

No. 08-3275

ORDER

Before **TACHA**, **BRISCOE**, and **GORSUCH**, Circuit Judges.

Jay D. Breazeale seeks authorization to file a second or successive 28 U.S.C. § 2254 petition. Because Mr. Breazeale admits in his motion that he cannot meet the requisite conditions under 28 U.S.C. § 2244, we deny authorization and dismiss the proceeding.

In 1983, Mr. Breazeale was convicted in Kansas state court of three counts of aggravated burglary, one count of attempted aggravated burglary, three counts of aggravated sodomy, one count of attempted rape and two counts of unlawful possession of a firearm. His convictions were affirmed on direct appeal. Mr. Breazeale filed three state post-conviction motions, which resulted in one count of sodomy being reversed, but his convictions were affirmed on all other counts.

Mr. Breazeale was initially incarcerated in the Oregon State Penitentiary pursuant to the terms of the Interstate Corrections Compact between Oregon and Kansas. During his incarceration there, he filed a § 2254 petition in the District of Oregon challenging his convictions. His § 2254 petition was denied and that denial was affirmed on appeal by the Ninth Circuit.

In his motion before this court, Mr. Breazeale seeks authorization to file a second or successive § 2254 motion asserting four new grounds for relief. After each new ground, however, he has checked the box indicating that the new claim does not rely on a “new rule of law” or “newly discovered evidence.” Mot. at 8-10. Those phrases are short-hand for the requirements for authorization contained in 28 U.S.C. § 2244, which states that a movant must show either:

- (A) . . . 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; or
- (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
- (ii) 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.

Id. § 2244(b)(2).

Moreover, with the exception of his first proposed ground for relief, he does not attempt to offer any explanation as to why he should be permitted to file a second or successive § 2254 petition. As for the first ground for relief, which is

a challenge to a post-conviction decision by the Kansas state court, he asserts that he could not have raised it in his first § 2254 petition because the state post-conviction decision was not issued until after his first petition was filed. Mot. at 8. He presents no substantive argument, however, as to how this new claim satisfies the requirements for authorization set forth in § 2244. *Id.*

Authorization to file a second or successive § 2254 petition is DENIED and the matter is DISMISSED. This denial of authorization is not appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari. *See* 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 horizontal flourish.

ELISABETH A. SHUMAKER, Clerk