FILED
United States Court of Appeals
Tenth Circuit

February 15, 2017

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: JOHN FITZGERALD HANSON, Movant.	No. 17-5005 (D.C. No. 4:10-CV-00113-CVE-TLW) (N.D. Okla.)

ORDER

Before **BRISCOE**, **EBEL**, and **O'BRIEN**, Circuit Judges.

John Fitzgerald Hanson seeks authorization to file a second or successive capital habeas application under 28 U.S.C. § 2254 in the district court so he may assert a claim for relief based on *Hurst v. Florida*, ___ U.S. ___, 136 S. Ct. 616 (2016).[1] *See* 28 U.S.C. § 2244(b)(3). To obtain authorization, Mr. Hanson must make a prima facie showing that his claim meets the gatekeeping requirements of § 2244(b). *Case v. Hatch*, 731 F.3d 1015, 1027-29 (10th Cir. 2013). Because he has failed to make this showing, we deny authorization.

Following his conviction for two counts of first degree murder, Mr. Hanson unsuccessfully sought relief under § 2254. *Hanson v. Sherrod*, 797 F.3d 810, 819 (10th Cir. 2015), *cert. denied*, 136 S. Ct. 2013 (2016). He now seeks authorization to file a second or successive § 2254 application.

[1] Pursuant to 18 U.S.C. § 3006A, the Federal Public Defender for the Western District of Oklahoma is appointed as counsel for Mr. Hanson effective nunc pro tunc to the date the motion for authorization was filed in this court.

We may authorize a successive claim when "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." § 2244(b)(2)(A). Mr. Hanson contends that *Hurst* announced a new rule of constitutional law that "also warrants retroactive application," Mot. for Authorization at 3, and invites this court to so hold. But "whether, in *our* view, a new rule warrants retroactive application . . . is not the proper inquiry for purposes of § 2244(b)(2)'s gatekeeping requirements." *In re Jones*, No. 17-6008, slip op. at 4 (10th Cir. Feb. 10, 2017) (per curiam). "[T]he Supreme Court is the only entity that can 'ma[k]e' a new rule retroactive." *Tyler v. Cain*, 533 U.S. 656, 663 (2001). And as we held in *In re Jones*, slip op. at 4, the Supreme Court has not made its decision in *Hurst* retroactively applicable to cases on collateral review. Mr. Hanson therefore does not meet the requirements of § 2244(b)(2)(A).

The motion for authorization is denied. 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." § 2244(b)(3)(E).

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk