

October 24, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-51238
Conference Calendar

EDWARD C. STEWART,

Petitioner-Appellant,

versus

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:05-CV-411

Before JOLLY, DeMOSS, and STEWART, Circuit Judges.

PER CURIAM:*

Edward C. Stewart, Texas prisoner # 905933, pleaded nolo contendere to aggravated sexual assault of a child, an offense for which he received a 10-year sentence. Stewart filed a 28 U.S.C. § 2254 application to challenge this conviction and sentence in May 2001. Stewart filed another § 2254 application, which is the subject of the instant motion for a certificate of appealability (COA), in May 2005.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Stewart argues that the May 2005 application does not concern his conviction and that it is instead a challenge to the state's failure to preserve DNA evidence and its refusal to permit DNA testing. However, given Stewart's contention that DNA evidence was potentially exculpatory, we consider the May 2005 application to be a second or successive § 2254 application attacking the conviction. See Cook v. Texas Dep't of Crim. Justice Transitional Planning Dep't, 37 F.3d 166, 168 (5th Cir. 1994).

Stewart has not obtained authorization from this court to file a second or successive § 2254 application. The May 2005 application was thus an unauthorized application that the district court was without jurisdiction to consider. See United States v. Key, 205 F.3d 773, 774-75 (5th Cir. 2000).

Accordingly, this appeal is dismissed for lack of jurisdiction. See id. Stewart's COA motion is denied as unnecessary. His motion for leave to proceed in forma pauperis (IFP) is also denied.

APPEAL DISMISSED; REQUEST FOR COA DENIED AS UNNECESSARY; IFP DENIED.