

December 16, 2008

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

ANTHONY HEINEMANN,

Petitioner-Appellant,

v.

MICHAEL MURPHY, in his official
capacity as Wyoming Department of
Corrections State Penitentiary Warden;
BRUCE A. SALZBURG, in his
official capacity as Wyoming Attorney
General,

Respondents-Appellees.

No. 08-8042
(D.C. No. 08-CV-00072-WFD)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **O'BRIEN**, **McKAY**, and **GORSUCH**, Circuit Judges.

Petitioner seeks to challenge the district court's dismissal of his § 2254 petition as an unauthorized "second or successive" habeas petition. Respondents have filed a letter conceding that the instant petition was not a second or successive petition because the prior habeas petition, while raising similar claims, originated from a different conviction. *See Hardemon v. Quarterman*, 516 F.3d

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

272, 275-76 (5th Cir. 2008) (holding that “to be considered “successive,” a prisoner’s second petition must, in a broad sense, represent a second attack by federal habeas petition on the same conviction’” (quoting *Vasquez v. Parrott*, 318 F.3d 387, 390 (2d Cir. 2003)). Therefore, construing Petitioner’s notice of appeal and appellate brief as an implied motion for leave to file a successive petition, *see Pease v. Klinger*, 115 F.3d 763, 764 (10th Cir. 1997), we dismiss the motion as unnecessary and direct the district court to entertain Petitioner’s habeas petition.

Entered for the Court

Monroe G. McKay
Circuit Judge