

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF
CALIFORNIA

Tommy Cole v. Leanna Lundy

Cole v. Lundy · No. 2:25-cv-1609-TJH-RAO · Decided June 27, 2025

SUMMARY

The United States District Court for the Central District of California summarily dismissed Tommy Cole’s successive petition for a writ of habeas corpus challenging his 2013 state conviction. The court held that Cole had not obtained authorization from the Ninth Circuit as required under 28 U.S.C. § 2244(b), and therefore lacked jurisdiction. The dismissal was without prejudice, pending motions were denied as moot, and a certificate of appealability was denied.

CASE DETAILS

COURT	United States District Court for the Central District of California
WRITING FOR THE COURT	Terry J. Hatter, Jr.
JURISDICTION	United States District Court for the Central District of California
DECIDED	June 27, 2025
DOCKET	2:25-cv-1609-TJH-RAO
DISPOSITION	dismissed
PROCEDURAL POSTURE	Petitioner's pro se petition under 28 U.S.C. § 2254 was summarily dismissed without prejudice as a second or successive habeas petition filed without authorization from the Ninth Circuit. A certificate of appealability was denied.
STANDARD OF REVIEW	Under Rule 4 of the Rules Governing Section 2254 Cases, the district court may dismiss a habeas petition that plainly shows the petitioner is not entitled to relief. The court may also sua sponte dismiss a second or successive petition for lack of jurisdiction.
PRECEDENTIAL VALUE	Unpublished district court order; precedential status unknown
PARTIES	Tommy Cole v. Leanna Lundy, Warden

TOPICS

- federal habeas corpus
- successive petitions
- subject matter jurisdiction
- post-conviction relief
- appellate procedure

PRACTICE AREAS

federal habeas corpus

post-conviction relief

appellate procedure

civil procedure

QUESTIONS PRESENTED

1. Whether the petition was a second or successive habeas petition because it challenged the same 2013 state-court conviction previously challenged in federal habeas proceedings.
2. Whether the assertion of a new claim or legal argument under California Penal Code § 745(a)(1) allowed Cole to avoid the authorization requirement for a second or successive petition.
3. Whether the petition should be dismissed for lack of jurisdiction and whether a certificate of appealability should issue.

HOLDINGS

1. A habeas petition that challenges the same state-court conviction previously challenged in a federal habeas petition dismissed on the merits is a second or successive petition subject to 28 U.S.C. § 2244(b).
2. A petitioner may not bypass the authorization requirement merely by presenting new claims or a new legal argument when the petition attacks the same underlying judgment and the prior petition was dismissed on the merits.
3. Because Cole had not obtained Ninth Circuit authorization to file the successive petition, the district court lacked jurisdiction and dismissed the petition without prejudice.
4. A certificate of appealability was denied because the petition was patently successive and reasonable jurists could not debate the correctness of the procedural ruling.

KEY QUOTATIONS

“Because a district court’s ability to hear a second or successive petition is jurisdictional, the court may sua sponte dismiss the petition on that ground.” (at 3)

“Even though Petitioner presents a new argument in support of the instant Petition, that alone does not allow him to bypass the statutory obligation to first seek authorization from the Ninth Circuit before filing a second or successive petition.” (at 5)

“For these reasons, the Court finds that it lacks jurisdiction to consider the Petition.” (at 7-8)

FACTUAL BACKGROUND

Cole is in state custody pursuant to a 2013 conviction in Los Angeles County Superior Court. He filed the present § 2254 petition challenging that conviction after previously litigating two federal habeas petitions concerning the same judgment. Although the present petition asserted a new argument under California Penal Code § 745(a)(1), Cole had not obtained Ninth Circuit authorization to file a second or successive petition.

PROCEDURAL HISTORY

Cole challenged his 2013 Los Angeles County Superior Court conviction through a new § 2254 petition. He had previously filed two habeas petitions concerning the same conviction; one was dismissed on the merits and the other as successive. After the district court issued a screening order identifying the new petition as successive, Cole argued that it was not successive because it raised a new claim under California Penal Code § 745(a)(1). The court rejected that argument, dismissed for lack of jurisdiction, denied pending motions as moot, and denied a certificate of appealability.

DISPOSITION

dismissed

CASES CITED

- Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010)
- Cole v. Johnson, No. 2:23-cv-10913 (C.D. Cal. Jan. 5, 2024)
- Cole v. Rackley, No. 2:16-cv-7437 (C.D. Cal. Aug. 30, 2018)
- Burton v. Stewart, 549 U.S. 147, 152-53 (2007)
- Day v. McDonough, 547 U.S. 198, 205-06 (2006)
- Harris v. County of Orange, 682 F.3d 1126, 1131-32 (9th Cir. 2012)
- Jones v. Davis, 8 F.4th 1027, 1035 (9th Cir. 2021)
- Gonzalez v. Crosby, 545 U.S. 524, 529-30 (2005)
- Felker v. Turpin, 518 U.S. 651, 656-57, 664 (1996)
- Balbuena v. Sullivan, 980 F.3d 619, 634-35 (9th Cir. 2020)
- Goodrum v. Busby, 824 F.3d 1188, 1193-94 (9th Cir. 2016)
- Cole v. Hill, No. 24-365 (9th Cir. Aug. 22, 2024)
- Miller-El v. Cockrell, 537 U.S. 322, 327 (2003)
- Slack v. McDaniel, 529 U.S. 473, 478 (2000)

OPINION

1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 CENTRAL DISTRICT OF
CALIFORNIA 10 11 TOMMY COLE, Case No. 2:25-cv-1609-TJH-RAO 12 Petitioner, ORDER
SUMMARILY DISMISSING 13 v. SUCCESSIVE PETITION FOR WRIT OF HABEAS
CORPUS FOR LACK 14 LEANNA LUNDY, Warden, OF JURISDICTION AND DENYING
CERTIFICATE OF APPEALABILITY 15 Respondent. 16 17 I. BACKGROUND 18 On February
11, 2025,¹ Petitioner Tommy Cole (“Petitioner”), proceeding pro 19 se and in forma pauperis,
constructively filed a Petition for Writ of Habeas Corpus 20 by a Person in State Custody
 (“Petition”) pursuant to 28 U.S.C. § 2254.

Petitioner 21 seeks habeas relief from state custody arising from his 2013 conviction in Los 22
Angeles County Superior Court, case no. BA354746. Dkt. No. 3 (“Pet.”) at 2. 23 The Court notes

that Petitioner previously has filed two habeas petitions 24 concerning the same 2013 conviction and sentence, both of which this Court has 25 26 1 Under the “mailbox rule,” when a pro se prisoner gives prison authorities a pleading to mail on their behalf, the court deems the pleading constructively “filed” on the 27 date it is signed.

Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010). The 28 Petition was filed in this Court on February 27, 2025. 1 denied.2 Cole v. Johnson, No. 2:23-cv-10913 (C.D. Cal. Jan. 5, 2024) (“2023 2 Petition”); Cole v. Rackley, No. 2:16-cv-7437 (C.D. Cal. Aug. 30, 2018) (“2016 3 Petition”).

The Court dismissed Petitioner’s 2016 Petition on the merits. See Order 4 Accepting Report and Recommendation and Judgment, Cole v. Rackley, No. 2:16- 5 cv-7437 (C.D. Cal. Aug. 30, 2018), Dkt. Nos. 62–63. And the Court dismissed the 6 2023 Petition as successive. See Order Summarily Dismissing Successive Petition 7 For Writ of Habeas Corpus for Lack of Jurisdiction, Cole v. Johnson, No. 2:23-cv- 8 10913 (C.D.

Cal. Jan. 5, 2025), Dkt. No. 5. 9 Because neither the Petition itself nor the records of the Ninth Circuit show 10 that Petitioner has obtained authorization from the Ninth Circuit to file a successive 11 petition in this Court, the Court issued a screening order on March 4, 2025 12 (“Screening Order”). Dkt. No. 6.

The Screening Order informed Petitioner that the 13 instant Petition appeared to be a second or successive petition and thus required the 14 Ninth Circuit’s permission before filing. Dkt. No. 6. Petitioner responded to the 15 Screening Order stating the Petition is not successive because it raises a new claim 16 under California law. Dkt. No. 9. 17 For the following reasons, the Petition is dismissed without prejudice.

18 II. STANDARD OF REVIEW 19 A district court may rely on the petition and any attached exhibits to dismiss a 20 petition that plainly shows that the petitioner is not entitled to habeas relief. Rule 4, 21 Rules Governing Section 2254 Cases in the United States District Courts.

Because 22 a district court’s ability to hear a second or successive petition is jurisdictional, the 23 court may sua sponte dismiss the petition on that ground. See Burton v. Stewart, 549 24 U.S. 147, 152–53 (2007); Day v. McDonough, 547 U.S. 198, 205–06 (2006). 25 /// 26 2 The Court takes judicial notice of these court records and files as well as those of 27 the Court of Appeals for the Ninth Circuit, as necessary herein.

Fed. R. Evid. 28 201(b)(2); Harris v. County of Orange, 682 F.3d 1126, 1131–32 (9th Cir. 2012). 1
III. DISCUSSION 2 Habeas petitions filed after April 24, 1996, are governed by the Antiterrorism 3 and Effective Death Penalty Act (“AEDPA”). Jones v. Davis, 8 F.4th 1027, 1035 4 (9th Cir. 2021).

The United States Supreme Court has explained: 5 The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) established a stringent set of procedures that a 6 prisoner “in custody pursuant to the judgment of a State 7 court,” 28 U.S.C. § 2254(a), must follow if he wishes to file a “second or successive” habeas corpus application 8 challenging that custody, § 2244(b)(1).

In pertinent part, 9 before filing the application in the district court, a prisoner “shall move in the appropriate court of appeals for an order 10 authorizing the district court to consider the application.” 11 § 2244(b)(3)(A). A three-judge panel of the court of appeals may authorize the filing of the second or successive 12 application only if it presents a claim not previously raised 13 that satisfies one of the two grounds articulated in § 2244(b)(2). § 2244(b)(3)(C); *Gonzalez v. Crosby*, 545 U.S. 14 524, 529-530, 125 S. Ct.

2641, 162 L. Ed. 2d 480 (2005); 15 see also *Felker v. Turpin*, 518 U.S. 651, 656-657, 664, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996). 16 17 *Burton v. Stewart*, 549 U.S. 147, 152–53 (2007). 18 Because Petitioner’s claims in the instant Petition challenge the same 2013 19 conviction, the Court finds that the instant Petition is clearly second or successive, 20 and Petitioner must first seek authorization from the Ninth Circuit to file his petition.

21 *Balbuena v. Sullivan*, 980 F.3d 619, 634–35 (9th Cir. 2020). 22 In response to the Screening Order, Petitioner states that the instant Petition is 23 not second or successive because it asserts new claims under California Penal Code 24 § 745(a)(1). Dkt. No. 9 at 1. A petitioner may not, however, present new claims not 25 previously raised in a prior habeas petition if they attack the same underlying 26 judgment, and the prior petition was dismissed on the merits.

See *Goodrum v. Busby*, 27 824 F.3d 1188, 1193–94 (9th Cir. 2016). Even though Petitioner presents a new 28 argument in support of the instant Petition, that alone does not allow him to bypass 1 the statutory obligation to first seek authorization from the Ninth Circuit before filing 2 a second or successive petition.3 28 U.S.C. § 2244(b)(2).

The Petition continues to 3 attack the same underlying 2013 conviction, and Petitioner has not been granted 4 authorization by the Ninth Circuit to file a successive petition and present his claims 5 based on California Penal Code § 745(a)(1). 6 For these reasons, the Court finds that it lacks jurisdiction to consider the 7 Petition.

The reference to the Magistrate Judge is therefore vacated, and the Petition 8 is dismissed for lack of jurisdiction. *Burton*, 549 U.S. at 152–53. Any pending 9 motions are denied as moot, and the Clerk is directed to enter judgment dismissing 10 the Petition. 11 IV. CERTIFICATE OF APPEALABILITY 12 Under AEDPA, a state prisoner seeking to appeal a district court’s final order 13 in a habeas corpus proceeding must obtain a Certificate of Appealability (“COA”) 14 from the district judge or a circuit judge.

28 U.S.C. § 2253(c)(1)(A). A COA may be issued “only if the applicant has made a substantial showing of the denial of a 16 constitutional right.” 28 U.S.C. § 2253(c)(2). “A petitioner satisfies this standard by 17 demonstrating that jurists of reason could disagree with the district court’s resolution 18 of his constitutional claims or that jurists could conclude the issues presented are 19 adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

21 When the Court dismisses a petition on procedural grounds, it must issue a 22 COA if the petitioner shows: (1) “that jurists of reason would find it debatable 23 whether the petition states a valid claim of the denial of a constitutional right”; and 24 3 Publicly available records from the Ninth Circuit indicate that Petitioner filed an 25 application to file a second or successive habeas petition, and the Ninth Circuit denied 26 the application on August 22, 2024, finding that Petitioner had not made a prima facie showing under 28 U.S.C. § 2244(b)(2).

Cole v. Hill, No. 24-365 (9th Cir. Aug. 22, 27 2024). Petitioner’s application to the Ninth Circuit was based on the arguments 28 presented to this Court in the 2023 Petition. 1) (2) “that jurists of reason would find it debatable whether the district court was 2] correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). 3 Here, the Court is dismissing the Petition without prejudice because it is a 4 || successive petition without proper authorization from the Ninth Circuit.

Since the 5 || Petition is patently a successive petition, Petitioner cannot make the requisite 6 || showing that jurists of reason would find it debatable whether the district court was 7 || correct in its procedural ruling.

V. CONCLUSION 9 Based on the foregoing, IT IS ORDERED THAT: 10 1. The Petition is DISMISSED without prejudice for lack of jurisdiction; and 11 2. A Certificate of Appealability is DENIED. 12 13 | DATED: June 27, 2025 eT Le. wae □□□ 14 (sit ee TERRY J AIATTER, JR. IS UNITED STATES DISTRICT JUDGE 16 17 18 19 20 21 22 23 24 25 26 27 28