

**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

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 previously raised in a prior habeas petition if they attack the same underlying judgment, and the prior petition was dismissed on the merits.

See *Goodrum v. Busby*, 824 F.3d 1188, 1193–94 (9th Cir. 2016). 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. 28 U.S.C. § 2244(b)(2).

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

The reference to the Magistrate Judge is therefore vacated, and the Petition is dismissed for lack of jurisdiction. *Burton*, 549 U.S. at 152–53. Any pending motions are denied as moot, and the Clerk is directed to enter judgment dismissing the Petition.

IV. CERTIFICATE OF APPEALABILITY

Under AEDPA, a state prisoner seeking to appeal a district court’s final order in a habeas corpus proceeding must obtain a Certificate of Appealability (“COA”) from the district judge or a circuit judge.

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

When the Court dismisses a petition on procedural grounds, it must issue a COA if the petitioner shows: (1) “that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right”; and (2) “Publicly available records from the Ninth Circuit indicate that Petitioner filed an application to file a second or successive habeas petition, and the Ninth Circuit denied 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, 2024). Petitioner’s application to the Ninth Circuit was based on the arguments presented to this Court in the 2023 Petition. (2) “that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Here, the Court is dismissing the Petition without prejudice because it is a 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