

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA**

Leroy Tate Jr. v. Edward Borla

Tate v. Borla · No. 1:25-cv-01583-SAB-HC · Decided November 26, 2025

OPINION

1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 EASTERN DISTRICT OF
CALIFORNIA 10 11 LEROY TATE JR., Case No. 1:25-cv-01583-SAB-HC 12 Petitioner,
FINDINGS AND RECOMMENDATION TO DISMISS PETITION FOR WRIT OF 13 v.
HABEAS CORPUS AS UNAUTHORIZED SUCCESSIVE PETITION, DENY 14 EDWARD
BORLA, PETITIONER’S APPLICATION FOR LEAVE TO FILE SECOND OR 15 Respondent.
SUCCESSIVE PETITION, AND DENY PETITIONER’S MOTION TO STAY 16 (ECF Nos. 1, 2,
4) 17 ORDER DIRECTING CLERK OF COURT 18 TO RANDOMLY ASSIGN DISTRICT
JUDGE 19 20 I. 21 BACKGROUND 22 Petitioner is a state prisoner currently confined at the
California Training Facility, serving 23 a thirty-years-to-life sentence for a murder conviction
sustained in the Kings County Superior 24 Court.

(ECF No. 1 at 1.1) On November 18, 2025, Petitioner filed the instant federal petition for 25 writ
of habeas corpus. (ECF No. 1.) In his sole claim for relief, Petitioner asserts that the 26
prosecution against him was commenced under a repealed state constitutional authority. (Id. at 27
5.) Along with the petition, Petitioner filed an application for leave to file a second or successive 1
petition and a motion for stay and abeyance pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005).

2 (ECF Nos. 2, 4.) 3 II. 4 DISCUSSION 5 Rule 4 of the Rules Governing Section 2254 Cases
requires preliminary review of a 6 habeas petition and allows a district court to dismiss a petition
before the respondent is ordered 7 to file a response, if it “plainly appears from the petition and
any attached exhibits that the 8 petitioner is not entitled to relief in the district court.” Rule 4,
Rules Governing Section 2254 9 Cases in the United States District Courts, 28 U.S.C. foll. § 2254.

10 A federal court must dismiss a second or successive petition that raises the same grounds 11 as
a prior petition. 28 U.S.C. § 2244(b)(1). The court must also dismiss a second or successive 12
petition raising a new ground unless the petitioner can show that (1) the claim rests on a new, 13
retroactive, constitutional right or (2) the factual basis of the claim was not previously 14
discoverable through due diligence, and these new facts establish by clear and convincing 15
evidence that but for the constitutional error, no reasonable factfinder would have found the 16
applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2)(A)–(B). 17 However, it is not the district court that decides whether a
second or successive petition 18 meets these requirements. Section 2244(b)(3)(A) provides:

“Before a second or successive 19 application permitted by this section is filed in the district court, the applicant shall move in the 20 appropriate court of appeals for an order authorizing the district court to consider the 21 application.” In other words, Petitioner must obtain leave from the Ninth Circuit before he can 22 file a second or successive petition in the district court.

See *Felker v. Turpin*, 518 U.S. 651, 656– 23 57 (1996). This Court must dismiss any second or successive petition unless the Court of 24 Appeals has given Petitioner leave to file the petition because a district court lacks subject-matter 25 jurisdiction over a second or successive petition. *Burton v. Stewart*, 549 U.S. 147, 157 (2007). 26 Here, Petitioner challenges his 2004 Kings County murder conviction.

(ECF No. 1 at 1.) 27 Petitioner previously sought federal habeas relief in this Court with respect to the 2004 Kings 1 untimely); *Tate v. Borla*, No. 1:24-cv-00324-KES-SKO (dismissed as successive).2 Accordingly, 2 the Court finds that the instant petition is “second or successive” under § 2244(b) and should be 3 dismissed. See *McNabb v. Yates*, 576 F.3d 1028, 1030 (9th Cir.

2009) (holding “dismissal of a 4 first habeas petition for untimeliness presents a ‘permanent and incurable’ bar to federal review 5 of the underlying claims,” and thus renders subsequent petitions “second or successive”). 6 Petitioner also filed an application for leave to file a second or successive petition. (ECF 7 No. 2.)

However, “a petitioner cannot bring a second or successive habeas application directly to 8 the district court. Instead, he must first go to the court of appeals and make a ‘prima facie 9 showing’ that the petition satisfies one of § 2244(b)(2)’s exceptions, and that court has to grant 10 authorization for the petitioner to proceed in district court.” *Rivers v. Guerrero*, 605 U.S. 443, 11 450 (2025).

Accordingly, the application should be denied. 12 Petitioner also moves for a stay and abeyance pursuant to *Rhines v. Weber*, 544 U.S. 269 13 (2005). Under *Rhines*, “stay and abeyance” is available only in “limited circumstances,” and 14 only when: (1) there is “good cause” for the failure to exhaust; (2) the unexhausted claims are 15 not “plainly meritless”; and (3) the petitioner did not intentionally engage in dilatory litigation 16 tactics.

544 U.S. at 277–78. However, as set forth above, the petition is an unauthorized 17 successive petition, and Petitioner must obtain prior leave from the Ninth Circuit to file a petition 18 in this Court. Accordingly, Petitioner’s motion to stay should be denied. 19 III. 20 RECOMMENDATION & ORDER 21 Based on the foregoing, the Court HEREBY RECOMMENDS that: 22 1.

The petition for writ of habeas corpus be DISMISSED as an unauthorized successive 23 petition; 24 2. Petitioner’s application for leave to file a second or successive petition (ECF No. 2) be 25 DENIED; and 26 3. Petitioner’s motion to stay (ECF No. 4) be DENIED. 27 2 The Court may

take judicial notice of its own records in other cases. *United States v. Wilson*, 631 F.2d 118, 119 1
Further, the Clerk of Court is DIRECTED to randomly assign this action to a District 2 | Judge.

3 This Findings and Recommendation is submitted to the assigned United States District 4 | Court
Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local 5 | Rules
of Practice for the United States District Court, Eastern District of California. Within 6 | THIRTY
(30) days after service of the Findings and Recommendation, Petitioner may file 7 | written
objections with the Court, limited to fifteen (15) pages in length, including any 8 | exhibits.

Such a document should be captioned “Objections to Magistrate Judge’s Findings and 9 |
Recommendation.” The assigned District Judge will then review the Magistrate Judge’s ruling 10 |
pursuant to 28 U.S.C. § 636(b)(1)(C).

The parties are advised that failure to file objections within 11 | the specified time may waive the
right to appeal the District Court’s order. 12 3 IT IS SO ORDERED. FA. Se 14 | Dated: _
November 26, 2025 STANLEY A. BOONE 15 United States Magistrate Judge 16 17 18 19 20 21
22 23 24 25 26 27 28