

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-2490

Barry Glenn Thunder

Petitioner - Appellant

v.

Douglas Weber

Respondent - Appellee

Appeal from U.S. District Court for the District of South Dakota - Sioux Falls
(4:18-cv-04054-LLP)

JUDGMENT

Before LOKEN, SHEPHERD and KELLY, Circuit Judges.

The court has carefully reviewed the original file of the United States District Court and
orders that this appeal be dismissed for lack of jurisdiction.

October 22, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

BARRY GLENN THUNDER, * CIV 18-4054

Petitioner, *

vs. * JUDGMENT

DOUGLAS WEBER, *

Respondent. *

In accordance with the Order filed with the Clerk this date,

IT IS ORDERED, ADJUDGED and DECREED that this action is dismissed without prejudice.

Dated this 4th day of June, 2018.

BY THE COURT:



Lawrence L. Piersol

United States District Judge

ATTEST:

MATTHEW W. THELEN, CLERK

By: 

Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

*
BARRY GLENN THUNDER, * CIV. 18-4054
*
Petitioner, *
*
vs. * ORDER
*
DOUGLAS WEBER, *
*
Respondent. *
*

Petitioner Barry Glenn Thunder, an inmate at the Montana State Prison, has applied for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Magistrate Judge issued a Report and Recommendation recommending that the Petition be dismissed without prejudice as this Court lacks jurisdiction to hear Mr. Thunder's Petition. Petitioner did not file Objections to the Report and Recommendation, however he did file a letter with the Court, which the Court will consider as Objections to the Report and Recommendation.

After conducting an independent review of the record, the Court agrees with the Magistrate Judge. Accordingly,

IT IS ORDERED:

1. That the Report and Recommendation, Doc. 5, is ADOPTED.
2. That Petitioner's Objections to the Report and Recommendation, Doc. 6, which the Court construes Petitioner's letter filed with the Court to be, is denied.
3. That Petitioner's Application for Writ of Habeas Corpus, Doc. 1, is dismissed without prejudice.
4. That Petitioner's Motion for Leave to Proceed in forma pauperis, Doc. 2, is denied as moot.

5. That a certificate of appealability shall not issue.

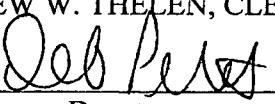
Dated this 4th day of June, 2018.

BY THE COURT:



Lawrence L. Piersol
United States District Judge

ATTEST:
NATTHEW W. THELEN, CLERK

By: 
Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

BARRY GLENN THUNDER, Petitioner, vs. DOUGLAS WEBER, Respondents.	4:18-CV-04054-LLP REPORT AND RECOMMENDATION
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Mr. Thunder again seeks to challenge his South Dakota criminal conviction for one count of first-degree rape and four counts of possession, manufacturing or distribution of child pornography. A judgment of conviction was entered on February 5, 2009. Mr. Thunder was sentenced to sixty years in the penitentiary on the first-degree rape charge and ten years each on the pornography charges to run consecutive to each other, but concurrently with the rape sentence.

This court previously considered Mr. Thunder's habeas petition regarding the same conviction. See Thunder v. Young, CIV. 4:15-04120-LLP (D.S.D. 2016). That petition was dismissed on the merits and with prejudice on July 13, 2016. Id. at Docket No. 32. Mr. Thunder appealed and the Eighth Circuit Court of Appeals declined to issue a certificate of appealability and dismissed the appeal on November 16, 2016. Id. at Docket 43. Rehearing was also denied. Id. at Docket 44.

Mr. Thunder has made no showing he received permission from the Eighth Circuit Court of Appeals to file a second or subsequent petition for a writ of habeas corpus as is required by 28 U.S.C. § 2244(b)(3)(A).

A "second or successive" habeas petition requires authorization from a federal court of appeals prior to filing. 28 U.S.C. 2244(b)(3)(A). "Second or successive" is a term of art and not every habeas petition that is second in time requires preauthorization. Crouch v. Norris, 251 F.3d 720, 723-25 (8th Cir. 2001). Where a claimant could not have raised a claim in his first habeas petition because it had not yet arisen, he will be allowed to seek a second habeas petition without first obtaining our authorization. Singleton v. Norris, 319 F.3d 1018, 1023 (8th Cir. 2003).

See Williams v. Hobbs, 658 F.3d 842, 853 (8th Cir. 2011).

"If an application is 'second or successive,' the petitioner must obtain leave from the Court of Appeals before filing it with the district court." See Magwood v. Patterson, 561 U.S. 320, 331 (2010) (citing 28 U.S.C. § 2244(b)(3)(A)). District courts must dismiss for lack of subject matter jurisdiction second or successive applications unless the petitioner has obtained the requisite court of appeals preauthorization. Id.; Burton v. Stewart, 549 U.S. 147, 157 (2007). If, however, an application was not second or successive, it is not subject to § 2244(b) at all and is reviewable in the district court directly. Magwood, 561 U.S. at 331; In re Moore, 196 F.3d 252, 254 (D.C. Cir. 1999).

Section 2244(b)(3) "impose[s] three requirements on second or successive habeas petitions: First, any claim that has already been adjudicated in a previous petition must be dismissed." See Gonzalez v. Crosby, 545 U.S. 524, 530 (2005) (citing § 2244(b)(1)). "Second, any claim that has *not* already been

adjudicated must be dismissed unless it relies on either a new and retroactive rule of constitutional law or new facts showing a high probability of actual innocence." Id. § 2244(b)(2). Third, if a petition is second or successive, "the court of appeals must determine that it presents a claim not previously raised that is sufficient to meet § 2244(b)(2)'s new-rule or actual-innocence provisions. § 2244(b)(3)." Id.

The general gist of Mr. Thunder's claims is that he was prohibited from testifying at trial in his defense, his cell phone was unlawfully searched, he wished to present his case to the grand jury and he received ineffective assistance of counsel.

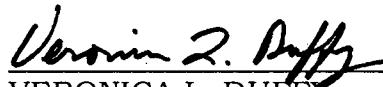
The facts of a second or successive petition must be "new" and they could not have been discoverable through the exercise of due diligence. Engesser v. Dooley, 686 F.3d 928, 936 (8th Cir. 2012). The facts Mr. Thunder assert satisfy neither prong of the test.

The instant habeas petition pending before the court does not comply with § 2244(b). It clearly is a "second or successive" petition and Mr. Thunder did not apply to the Eighth Circuit prior to filing the petition to obtain that court's order authorizing his second habeas application. See 28 U.S.C. § 2244(b)(3)(A). The language of § 2244(b)(3)(A) is mandatory—"shall." The failure of Mr. Thunder to obtain an order from the Eighth Circuit authorizing this second petition is fatal because this court lacks jurisdiction to hear Mr. Thunder's petition. Burton, 549 U.S. at 157. When issues of subject matter jurisdiction are apparent, the court may raise the issue *sua sponte*. See

Hart v. United States, 630 F.3d 1085, 1089 (8th Cir. 2011). Because this court has no subject matter jurisdiction over Mr. Thunder's petition, it is hereby RECOMMENDED that Mr. Thunder's petition be dismissed without prejudice and any pending motions denied as moot.

DATED May 15, 2018.

BY THE COURT:



VERONICA L. DUFFY
United States Magistrate Judge