

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-10896
Non-Argument Calendar

D.C. Docket No. 5:18-cv-00004-LSC-JEO

JAMES KEITH LARRY,

Petitioner-Appellant,

versus

WARDEN,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

(September 20, 2018)

Before MARCUS, EDMONDSON, and HULL, Circuit Judges.

PER CURIAM:

Petitioner James Larry, an Alabama state prisoner proceeding pro se, appeals the dismissal of his 28 U.S.C. § 2254 petition. The district court explained the applicable law correctly and determined that Petitioner's section 2254 petition was an unauthorized second or successive petition. No reversible error has been shown; we affirm the dismissal.

In 2010, Petitioner was convicted of aggravated stalking and of criminal mischief, in violation of Alabama law. The state court sentenced Petitioner to life imprisonment and to a consecutive 15-year term of imprisonment for his two convictions. Petitioner's convictions and sentences were affirmed on direct appeal. Larry v. State, 107 So. 3d 231 (table) (Ala. Crim. App. 2011). The state court also denied Petitioner post-conviction relief.

Petitioner filed his first 28 U.S.C. § 2254 petition in 2012. The district court denied with prejudice the 2012 petition. This Court then denied Petitioner a certificate of appealability.

In January 2018, Petitioner filed the pro se section 2254 petition at issue in this appeal. Petitioner again sought to challenge his 2010 convictions. The district court dismissed -- as second or successive -- without prejudice the 2018 petition.

“We review de novo whether a petition for a writ of habeas corpus is second or successive.” Patterson v. Sec'y, Fla. Dep't of Corr., 849 F.3d 1321, 1324 (11th Cir. 2017) (en banc). We construe liberally pro se pleadings. Tannenbaum v. United States, 148 F.3d 1262, 1263 (11th Cir. 1998).

The Anti-terrorism and Effective Death Penalty Act of 1996 (“AEDPA”) provides “a stringent set of procedures” that a state prisoner “must follow if he wishes to file a ‘second or successive’ habeas corpus application challenging that custody.” Burton v. Stewart, 549 U.S. 147, 152 (2007). In pertinent part, a state prisoner wishing to file a second or successive habeas corpus petition in the district court must first move the court of appeals for an order authorizing the district court to consider such a petition. 28 U.S.C. § 2244(b)(3)(A). Where the prisoner fails to seek or to obtain such authorization, the district court lacks jurisdiction to consider the merits of the petition. Burton, 549 U.S. at 152-53.

The district court committed no error in determining that Petitioner’s 2018 section 2254 petition was second or successive. The record demonstrates -- and Petitioner does not dispute -- that he already challenged his 2010 state-court convictions in his earlier-filed 2012 habeas petition, which was dismissed with prejudice. Because Petitioner has failed to obtain authorization from this Court to file a second or successive petition, the district court lacked jurisdiction to consider Petitioner’s 2018 petition. See id.

Petitioner contends he is entitled to file a second or successive habeas petition because he raises a claim not raised earlier in his 2012 petition. Although AEDPA allows the filing of a second or successive section habeas under limited circumstances, Petitioner must first file with this Court an application for leave to file a second or successive habeas petition -- and must obtain this Court's authorization -- before the district court may consider a newly-raised claim in a second or successively filed petition.

AFFIRMED.

Appendix 5

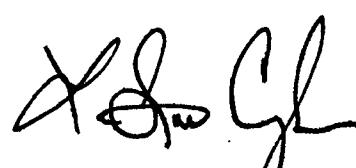
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JAMES KEITH LARRY,)
)
Petitioner,)
)
v.) 5:18-cv-0004-LSC-JEO
)
)
CHRISTOPHER GORDY, Warden,)
and the ATTORNEY GENERAL)
OF THE STATE OF ALABAMA,)
)
Respondents.)

FINAL ORDER

For the reasons stated in the Memorandum Opinion entered herewith, this
habeas corpus action filed pursuant to 28 U.S.C. § 2254 by Petitioner James Keith
Larry, *pro se*, is **DISMISSED WITHOUT PREJUDICE**, for lack of jurisdiction
under 28 U.S.C. § 2244(b). The Clerk is **DIRECTED** to close the file.

Done this 5th day of February 2018.



L. Scott Coogler
United States District Judge
[160704]

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION**

JAMES KEITH LARRY,)
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Petitioner,)
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v.) 5:18-cv-0004-LSC-JEO
)
CHRISTOPHER GORDY, Warden,)
and the ATTORNEY GENERAL)
OF THE STATE OF ALABAMA,)
)
Respondents.)

MEMORANDUM OPINION

This is a habeas corpus action filed pursuant to 28 U.S.C. § 2254 by Petitioner James Keith Larry, an Alabama state prisoner acting *pro se*. (Doc. 1). Larry was convicted at trial in 2010 in the Circuit Court of Lauderdale County, Alabama, on charges of aggravated stalking, *see* Ala. Code § 13A-6-91, and criminal mischief in the first degree, *see* Ala. Code § 13A7-21. The state trial court sentenced him to life imprisonment on the former charge and to 15 years imprisonment on the latter, with the sentences to run consecutively. In his federal habeas petition, Larry raises claims of ineffective assistance of counsel and argues that his due process rights were violated on the theory that he was incompetent to stand trial and was not criminally responsible for his actions due to an alleged mental defect. (Doc. 1 at 5, 10-26). On January 9, 2018, the magistrate judge to

whom the action is referred entered a Report and Recommendation (“R&R”), *see* 28 U.S.C. § 636(b), recommending that Larry’s petition be dismissed for lack of jurisdiction under 28 U.S.C. § 2244(b) because it is a successive § 2254 habeas application. (Doc. 4). Larry has now filed a timely Objection to the R&R. (Doc. 7).

Most of Larry’s arguments in his eight-page Objection assert that the R&R is due to be rejected because his claims for federal habeas relief are, he says, both timely filed under 28 U.S.C. § 2244(d) and exhausted in the Alabama state courts, as required under 28 U.S.C. § 2254(b). Even if Larry were correct that his claims are both timely and exhausted, these arguments are misguided. That is so because the R&R does not recommend that Larry’s claims be denied based on the statute of limitations or a failure to exhaust. Rather, the R&R recommends dismissal of the petition for lack of jurisdiction under 28 U.S.C. § 2244(b) on the ground that it is a second or successive habeas corpus application subject to § 2254. As the magistrate judge explained in the R&R, since Larry has previously filed a § 2254 habeas petition that was denied with prejudice, under § 2244(b)(3)(A), he must procure an order from the Eleventh Circuit Court of Appeals authorizing a district court to hear another § 2254 petition that attacks the validity of the same conviction. To that end, Larry does not dispute that he had a prior § 2254 habeas

petition denied with prejudice, that his instant § 2254 petition attacks the same Alabama conviction, or that he does not possess an authorizing order from the Eleventh Circuit.

Larry does raise one argument, however, in which he contends that this court can still hear his instant claims despite the limitations that § 2244(b) imposes on successive petitions. In particular, he maintains that the magistrate judge's recommendation to dismiss for lack of jurisdiction is "contrary to ... 28 U.S.C. § 2244(b)(B)(ii) [sic]." (Doc. 7 at 1). There is no such designated section of 28 U.S.C. § 2244, but it appears that Larry meant to refer to subsection (b)(2)(B)(ii) of the statute, insofar as he later cites and quotes from that provision in his Objection. (Doc. 7 at 4). In relevant part, § 2244(b)(2) provides as follows:

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. §§ 2244(b)(2)(B)(i), (ii).

In this vein, Larry acknowledges that he filed a prior federal habeas corpus petition. He emphasizes, however, that he did not therein raise his instant claim asserting that his conviction violated due process because he was mentally incompetent. (Doc. 7 at 2). From there, he seems to argue that this court is authorized to hear that previously unrepresented habeas claim pursuant to § 2244(b)(2)(B)(ii), on the theory that the evidence that he was “mentally insane at the time of the alleged offenses having been committed” is so strong that “no reasonable factfinder would have found [him] guilty” (*Id.* at 5).

for ruling with records

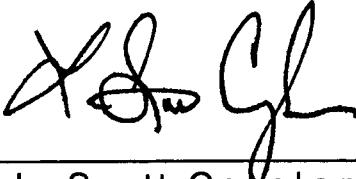
This line of argument is also wholly without merit. Larry seems to interpret § 2244(b)(2)(B)(ii) as allowing the jurisdictional bar on successive habeas petitions without an authorizing order to be overcome by a finding by the district court that the petitioner is actually innocent of his underlying crime. However, there is no judicially-created actual innocence exception that applies to § 2244(b)’s restrictions on successive habeas applications. *See In re Bolin*, 811 F.3d 403, 411 (11th Cir. 2016) (recognizing that the “actual innocence” exception that allows a federal district court to hear habeas claims that are otherwise time barred does not apply to the statutory restrictions on successive petitions); *Villar v. Warden*, 2017 WL 5617501, at *3 (N.D. Ala. Nov. 3, 2017) (Ott, M.J.), *report and*

recommendation adopted, 2017 WL 5598438 (N.D. Ala. Nov. 21, 2017); *Bell v. Thomas*, 2015 WL 5475412, at *2 (N.D. Ala. Sept. 14, 2015). Moreover, Larry's argument misapprehends how the statutory scheme operates. For starters, in order to be eligible to raise a claim not presented in a prior habeas petition in a successive petition under § 2244(b)(2)(B), an applicant must establish not just actual innocence, but also a constitutional violation, *see 28 U.S.C. § 2244(b)(2)(B)(ii); In re Lambrix*, 624 F.3d 1355, 1362 (11th Cir. 2010), and that the factual predicate for the claim could not have been discovered previously through the exercise of due diligence. 28 U.S.C. § 2244(b)(2)(B)(i). But more to the point here, *the criteria set forth in § 2244(b)(2) for filing successive petitions are not considered by district courts*. Rather, those criteria are considered by the *appropriate court of appeals* in determining whether to issue an order authorizing an applicant to file a second or successive § 2254 petition in a district court. 28 U.S.C. § 2244(b)(3)(C). So even assuming purely for the sake of argument that Larry could make a showing meeting the requirements of both § 2244(b)(2)(B)(i) and (ii), he would have to make that case to the Eleventh Circuit, not this court. Accordingly, the magistrate judge was correct to conclude that this court lacks jurisdiction to entertain Larry's successive habeas petition.

Having carefully reviewed and considered *de novo* all the materials in the

court file, including the magistrate judge's Report and Recommendation and the Petitioner's Objections thereto, the court is of the opinion that the magistrate judge's findings are due to be and are hereby **ADOPTED** and his recommendation is **ACCEPTED**. Petitioner's Objections are **OVERRULED**. As a result, the petition for writ of habeas corpus is due to be **DISMISSED WITHOUT PREJUDICE** for lack of jurisdiction under 28 U.S.C. § 2244(b). A separate Final Order will be entered.

Done this 5th day of February 2018.



L. Scott Coogler
United States District Judge
[160704]

Appendix 4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JAMES KEITH LARRY,)
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Petitioner,)
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v.) 5:18-cv-0004-LSC-JEO
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CHRISTOPHER GORDY, Warden,)
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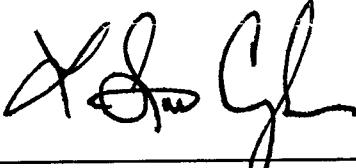
ORDER

This is a habeas corpus action filed pursuant to 28 U.S.C. § 2254 by Petitioner James Keith Larry, an Alabama state prisoner acting *pro se*. (Doc. 1). Larry was convicted at trial in 2010 in the Circuit Court of Lauderdale County, Alabama, on charges of aggravated stalking, *see* Ala. Code § 13A-6-91, and criminal mischief in the first degree, *see* Ala. Code § 13A7-21. The state trial court sentenced him to life imprisonment on the former charge and to 15 years imprisonment on the latter, with the sentences to run consecutively. On February 5, 2018, the court adopted a magistrate judge's report and recommendation, over Larry's objection, and dismissed the petition for lack of jurisdiction under 28 U.S.C. § 2244(b), on the ground that it is a successive § 2254 habeas application. (See Docs. 4, 7, 8, 9). On February 8, 2018, apparently before receiving a copy of

the court's dismissal order, Larry filed a "Motion to Stay Proceedings." (Doc. 11). He advises therein that he has recently received copies of his mental health treatment records and that he desires to offer some of them within 30 days to support the merits of his claims for habeas relief based on allegations that he was convicted while mentally incompetent and that his counsel was ineffective for failing to raise such a defense. (Doc. 11).

Given that the court has dismissed the action, the court will liberally construe Larry's *pro se* "Motion to Stay Proceedings" as a motion to alter or amend the judgment pursuant to Rule 59(e), FED. R. CIV. P. So treated, the motion (Doc. 11) is **DENIED**. Nothing in Larry's medical records could alter the court's conclusion that it lacks jurisdiction to hear this action under § 2244(b) because it is based on a second or successive habeas application for which Larry lacks an authorizing order from the Eleventh Circuit.

Done this 15th day of February 2018.



L. Scott Coogler
United States District Judge
[160704]

UNITED STATES DISTRICT COURT

Office of the Clerk
Northern District of Alabama
Room 140
United States Courthouse
1729 5th Avenue North
Birmingham, Alabama 35203

This is to confirm that on 1-2-18, you filed a civil action in the U.S. District Court, Northern District of Alabama. The action was styled Larry v. Gordy, and was assigned case docket number 5:18-cv-00004-LSC-JEO. This case number must be included with all future pleadings and correspondence involving this action. All pleadings and correspondence must be sent to the address in the above left hand corner.

This office will keep you informed of the status of your action by sending you copies of all orders entered by the Court.

It is your responsibility to keep the Court informed of your current address, and failure to do so may result in dismissal of your action.

SHARON N. HARRIS
CLERK OF COURT

**Additional material
from this filing is
available in the
Clerk's Office.**