

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JAN 10 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FLOYD DEWAINE SCOTT,

No. 19-56145

Petitioner-Appellant,

D.C. No. 2:19-cv-05737-JVS-KK
Central District of California,
Los Angeles

v.

STATE OF CALIFORNIA,

ORDER

Respondent-Appellee.

Before: THOMAS, Chief Judge, and PAEZ, Circuit Judge.

This appeal is from the dismissal of appellant's 28 U.S.C. § 2254 petition and the denial of his subsequent Federal Rule of Civil Procedure 60(b) motion. The request for a certificate of appealability (Docket Entry Nos. 2 and 3) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and 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, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015); *Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (order).

Any pending motions are denied as moot.

DENIED.

APPENDIX B

MIME-Version:1.0 From:cacd_ecfmail@cacd.uscourts.gov To:ecfnef@cacd.uscourts.gov
Message-Id:<28390850@cacd.uscourts.gov>Subject:Activity in Case 2:19-cv-05737-JVS-KK Floyd
Scott v. State of California Order Dismissing Case Content-Type: text/html

**This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT
RESPOND to this e-mail because the mail box is unattended.**
*****NOTE TO PUBLIC ACCESS USERS*** There is no charge for viewing opinions.**

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Notice of Electronic Filing

The following transaction was entered on 9/12/2019 at 8:52 AM PDT and filed on 9/11/2019

Case Name: Floyd Scott v. State of California

Case Number: 2:19-cv-05737-JVS-KK

Filer:

Document Number: 11

Docket Text:

ORDER SUMMARILY DISMISSING ACTION WITHOUT PREJUDICE by Judge James V. Selna. (see document for details) (hr)

2:19-cv-05737-JVS-KK Notice has been electronically mailed to:

**2:19-cv-05737-JVS-KK Notice has been delivered by First Class U. S. Mail or by other means
BY THE FILER to :**

Floyd Scott
No. D27081
A-4 112L
California State Prison LAC
PO Box 4430
Lancaster CA 93539

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

10 | FLOYD SCOTT,

Petitioner,

Case No. CV 19-5737-JVS (KK)

ORDER SUMMARILY DISMISSING
ACTION WITHOUT PREJUDICE

13 STATE OF CALIFORNIA.

Respondent.

I.

INTRODUCTION

19 On June 19, 2019, Floyd Scott (“Petitioner”) constructively filed¹ a “Motion for
20 Rule 60(b) Hearing” which the Court construes as a Petition for Writ of Habeas
21 Corpus by a Person in State Custody (“Petition”) pursuant to 28 U.S.C. § 2254
22 challenging his 2008 conviction. On August 7, 2019, the Court issued an Order to
23 Show Cause Why Petition Should Not Be Summarily Dismissed As Second And
24 Successive (“OSC”). On August 19, 2019, Petitioner constructively filed a response
25 to the OSC. For the reasons discussed below, the Court summarily DISMISSES this
26 action without prejudice.

²⁷ ²⁸ ¹ Under the “mailbox rule,” when a pro se prisoner gives prison authorities a pleading to mail to court, the Court deems the pleading constructively filed on the date it is signed. Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010) (citation omitted).

II.

SUMMARY OF PROCEEDINGS

3 On June 21, 1999, Petitioner was convicted of assault to commit rape, forcible
4 oral copulation, penetration by a foreign object, and false imprisonment by violence in
5 Los Angeles County Superior Court. Scott v. Harrington, No. CV 11-5738-GAF
6 (AJW), 2014 WL 3571732, at *1 (C.D. Cal. June 10, 2014), report and
7 recommendation adopted, 2014 WL 3589828 (C.D. Cal. July 18, 2014).² Petitioner
8 was sentenced to state prison for a term of 225 years to life. Id.

9 On March 21, 2003, Petitioner filed a Petition for Writ of Habeas Corpus by a
10 Person in State Custody (“2003 Petition”) pursuant to 28 U.S.C. § 2254 in this Court
11 challenging his 1999 conviction. Scott v. Lamarque, Case No. CV 03-2003-GAF
12 (AJW), Dkt. 1. On December 19, 2006, Petitioner’s 2003 Petition challenging his
13 1999 conviction was granted and he was ordered retried or released within 90 days.
14 Id. at Dkt. 42, Judgment.³

15 On August 10, 2008, upon retrial, Petitioner was convicted of one count of
16 assault to commit rape, two counts of forcible oral copulation, one count of
17 penetration by a foreign object, and one count of false imprisonment by violence.
18 Scott v. Asuncion, No. CV 16-2973-JVS (AJW), 2016 WL 3583837, at *1 (C.D. Cal.
19 June 6, 2016), report and recommendation adopted, 2016 WL 3607156 (C.D. Cal.
20 June 29, 2016). The jury also found true the allegations that Petitioner tied and bound
21 the victim in the commission of the offenses, had suffered prior felony convictions,

24 ² The Court takes judicial notice of its own records and files as well as Petitioner's
prior proceedings in the state courts. Fed. R. Evid. 201(b)(2); In re Korean Air Lines
Co., 642 F.3d 685, 689 n.1 (9th Cir. 2011); United States v. Wilson, 631 F.2d 118, 119
9th Cir. 1980).

25

26 ³ On August 29, 2007, the Court issued an order (a) denying Petitioner’s “request” for
immediate release; (b) finding respondent “has been diligent in attempting to provide
petitioner with a trial” and has not violated the December 19, 2006 Judgment; and (c)
27 ordering that further requests challenging Petitioner’s detention in state custody
would not be entertained in the closed case and must be filed as a new habeas
28 petition. *Id.* at Dkt. 60.

1 and had served a prison term without remaining free of custody for a period of five
2 years. Id. Petitioner was sentenced to state prison for a term of 275 years to life. Id.
3 Petitioner appealed his conviction to the California Courts of Appeal, which
4 affirmed the judgment in a reasoned decision on October 28, 2009. People v. Scott,
5 No. B210946, 2009 WL 3450270, at *1 (Cal. Ct. App. Oct. 28, 2009).

6 Petitioner then filed a petition for review in the California Supreme Court,
7 which was summarily denied on January 13, 2010. California Courts, Appellate
8 Courts Case Information, Docket, https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1924923&doc_no=S177667&request_token=NiIwLSIkTkWzBRSSFdVEtJQFw0UDxfJCMuXzxSQCAgCg%3D%3D (last updated
10 Sept. 4, 2019 2:09 PM).

11 On July 4, 2011, Petitioner constructively filed a habeas petition in this Court
12 (the “2011 Petition”) challenging his 2008 conviction and raising the following sixteen
13 claims for relief:

- 15 1. The admission of the victim’s preliminary hearing testimony violated
16 Petitioner’s right to confrontation.
- 17 2. The trial court abused its discretion by admitting evidence of
18 Petitioner’s prior rapes.
- 19 3. Petitioner was denied due process by the admission of evidence of
20 other crimes for the purpose of inferring his propensity to commit the
21 charged offenses.
- 22 4. The state court lacked jurisdiction over petitioner because it failed to
23 comply with the judgment entered by this Court in Case No. CV 03-
24 2003-GAF(AJW) requiring a retrial within ninety days.
- 25 5. Admission of the 911 operator’s testimony that the victim said she
26 had been raped deprived Petitioner of his right of confrontation.
- 27 6. Petitioner received ineffective assistance of counsel.
- 28 7. The prosecutor committed misconduct.

1 8. Introduction of Petitioner's prior convictions deprived Petitioner of a
2 fair trial and violated the prohibition against double jeopardy.
3 9. Admission of the prior rape victims' testimony violated Petitioner's
4 plea agreement on the prior rape charges because the agreement
5 prohibited the victims from ever testifying against Petitioner.
6 10. The trial court violated Petitioner's right to represent himself.
7 11. Admission of the victim's preliminary hearing testimony violated
8 Petitioner's right to confrontation.
9 12. Petitioner's sentence after his retrial violated the prohibition against
10 Ex Post Facto laws because it was greater than his sentence after the first
11 trial and it was based upon the Three Strikes Law.
12 13. The trial court deprived Petitioner of a fair trial by providing the jury
13 with faulty instructions and by answering the jury's question outside of
14 Petitioner's presence.
15 14. The trial court at the preliminary hearing prevented Petitioner from
16 meaningfully cross-examining the victim and erroneously prevented
17 Petitioner from "going co-counsel."
18 15. The trial court erroneously admitted evidence of Petitioner's prior
19 convictions before Petitioner testified and was convicted.
20 16. Petitioner received ineffective assistance of counsel on appeal
21 because appellate counsel failed to raise the issues included in this federal
22 petition.

23 Scott v. Harrington, 2014 WL 3571732, at *3-4; Scott v. Harrington, No. CV 11-5738-
24 GAF (AJW), Dkt. 1. On July 18, 2014, the Court denied the 2011 Petition on the
25 merits and dismissed the action with prejudice. Scott v. Harrington, 2014 WL
26 3589828.

27 On August 3, 2014, Petitioner filed a notice of appeal of the denial of the 2011
28 Petition in the Ninth Circuit. Scott v. Harrington, No. CV 11-5738-GAF (AJW), Dkt.

1 71. On March 13, 2015, the Ninth Circuit denied Petitioner's request for a certificate
2 of appealability. Id. at Dkt. 79.

3 On June 19, 2019, Petitioner constructively filed the instant Petition
4 challenging his 2008 conviction on the grounds he was not retried within 90 days and
5 the "State withheld the Medical Records of the Alleged Victim which would show the
6 Petitioner to be Factually Innocent, Prosecutorial Misconduct and Ineffective
7 Assistant [sic] of Counsel." Dkt. 2 at 3-4. On August 7, 2019, the Court issued an
8 OSC as to why the Petition should not be dismissed and instructed Petitioner to
9 respond and explain why "the Petition is not a second and successive petition or
10 show[] that the Ninth Circuit has authorized review of this Petition." Dkt. 7 at 4.

11 On August 19, 2019, Petitioner filed a Response to the OSC arguing the
12 Petition should not be dismissed as second and successive because he was not retried
13 within 90 days and the medical records will show he is actually innocent. Dkt. 10.
14 The matter thus stands submitted.

15 **III.**

16 **DISCUSSION**

17 **THE PETITION IS SUBJECT TO DISMISSAL AS
18 SECOND AND SUCCESSIVE**

19 **A. APPLICABLE LAW**

20 Habeas petitioners generally may file only one habeas petition challenging their
21 conviction or sentence. See 28 U.S.C. § 2244(b)(1). Hence, if a prior petition raised a
22 claim that was adjudicated on the merits, a petitioner must "move in the appropriate
23 court of appeals for an order authorizing the district court to consider the [second or
24 successive petition]." Id. § 2244(b)(3)(A); McNabb v. Yates, 576 F.3d 1028, 1029 (9th
25 Cir. 2009); Goodrum v. Busby, 824 F.3d 1188, 1194 (9th Cir. 2016) ("As a general
26 principle, . . . a petition will not be deemed second or successive unless, at a
27 minimum, an earlier-filed petition has been finally adjudicated."). Absent proper
28 authorization from the court of appeals, district courts lack jurisdiction to consider

1 second or successive petitions and must dismiss such petitions without prejudice to
2 refiling if the petitioner obtains the necessary authorization. Burton v. Stewart, 549
3 U.S. 147, 152-53, 127 S. Ct. 793, 166 L. Ed. 2d 628 (2007); Cooper v. Calderon, 274
4 F.3d 1270, 1274 (9th Cir. 2001) (“When the AEDPA is in play, the district court may
5 not, in the absence of proper authorization from the court of appeals, consider a
6 second or successive habeas application.” (citation omitted)); 28 U.S.C. § 2244(b)(2).

7 **B. ANALYSIS**

8 Here, the instant Petition challenges the same conviction that was challenged in
9 the 2011 Petition (i.e., Petitioner’s 2008 conviction), which was adjudicated on the
10 merits. See Dkt. 2. Consequently, the instant Petition is second or successive to the
11 2011 Petition. As Petitioner has not presented any documentation indicating the
12 Ninth Circuit has issued “an order authorizing the district court to consider the
13 application,” the Court lacks jurisdiction over the claims, and the instant Petition is
14 subject to dismissal. 28 U.S.C. § 2244(b)(3)(A).

15 **IV.**

16 **ORDER**

17 Thus, this Court ORDERS Judgment be entered summarily DISMISSING this
18 action without prejudice.

19
20 Dated: September 11, 2019



21
22 HONORABLE JAMES V. SELNA
23 United States District Judge

24 Presented by:



25
26 HONORABLE KENLY KIYAH KATO
27 United States Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

FEB 12 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FLOYD DEWAINE SCOTT,

Petitioner-Appellant,

v.

STATE OF CALIFORNIA,

Respondent-Appellee.

No. 19-56145

D.C. No. 2:19-cv-05737-JVS-KK
Central District of California,
Los Angeles

ORDER

Before: LEAVY and MILLER, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 5) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

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