

United States Court of Appeals
for the Fifth Circuit

No. 22-50931

United States Court of Appeals
Fifth Circuit

FILED

February 17, 2023

JUAN L. CABALLERO,

Lyle W. Cayce
Clerk

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice,
Correctional Institutions Division,*

Respondent—Appellee.

Application for Certificate of Appealability
the United States District Court
for the Western District of Texas
USDC No. 5:22-CV-916

ORDER:

Juan L. Caballero, Texas prisoner # 1501352, was convicted of burglary of a habitation with intent to commit sexual assault, and he received a sentence of 60 years in prison. He now seeks a certificate of appealability (COA) to appeal the dismissal of his 28 U.S.C. § 2254 application, which the district court determined was an unauthorized successive application, and the denial of his Federal Rule of Civil Procedure 59(e) motion. Caballero argues that his challenges to his conviction are not successive because he is presenting new evidence purportedly establishing that prosecutors elected to

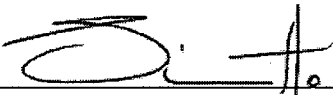
— Appendix A (a) —

No. 22-50931

charge him with an intent to commit sexual assault based on his history rather than any evidence of sexual intent and that witnesses falsely testified that he was in possession of a knife at the time of the offense. He also contends that the application was not successive because in 2012, after he filed his first application, Texas courts relaxed the rules for presenting evidence of perjury and because the state habeas court ruled on the merits of his claims.

To obtain a COA, Caballero must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see Slack v. McDaniel*, 529 U.S. 473, 484 (5th Cir. 2000). Where, as here, the district court’s denial of federal habeas relief is based on procedural grounds, this court will issue a COA “when the prisoner shows, at least, 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*, 529 U.S. at 484. Caballero has not met this standard.

Accordingly, a COA is DENIED. Caballero’s motions for leave to proceed in forma pauperis and for appointment of counsel are likewise DENIED.



JAMES C. HO
United States Circuit Judge

FILED

October 12, 2022

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

BY: _____ JU
DEPUTY

JUAN L. CABALLERO,
TDCJ No. 01501352,

Petitioner,

V.

**BOBBY LUMPKIN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,**

Respondent.

§

CIVIL NO. SA-22-CV-00916-OLG

ORDER

Before the Court is ~~pro se~~ Petitioner Juan L. Caballero's Motion for Permission to Appeal (Dkt. No. 14) wherein he requests permission to appeal the dismissal of his petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 as successive. In dismissing his federal habeas petition, however, this Court already determined a certificate of appealability is unwarranted because Petitioner failed to make "a substantial showing of the denial of a federal right" or a substantial showing that this Court's procedural ruling was incorrect as required by Fed. R. App. P. 22. ~~See~~ Dkt. No. 10 at 2 (citing **Sack v. McDaniel**, 529 U.S. 473, 483–84 (2000)). Accordingly, Petitioner's Motion for Permission to Appeal (Dkt. No. 14) is **DISMISSED** as moot.

It is so **ORDERED**.

SIGNED this 12th day of October, 2022.

John L.

ORLANDO L. GARCIA
Chief United States District Judge

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

Civil No. SA-22-CA-0916-OLG

Before a second or successive application for writ of habeas corpus may be filed in the district court, 28 U.S.C. § 2244(b)(3) provides an applicant must move in the appropriate court of appeals for an order authorizing the district court to consider the application. Pursuant to § 2244(b), the Court finds this successive application for writ of habeas corpus should be dismissed because Petitioner has not obtained prior approval to file a successive habeas corpus application. *See Burton v. Stewart*, 549 U.S. 147, 152 (2007) (holding the district court lacked jurisdiction to consider a successive § 2254 petition since petitioner did not obtain authorization from the court

- Appendix B -

- 2 -

of appeals); *In re Campbell*, 750 F.3d 523, 529 (5th Cir. 2014) (petitioner must receive authorization before filing successive habeas petition).

Accordingly, **IT IS HEREBY ORDERED** that:

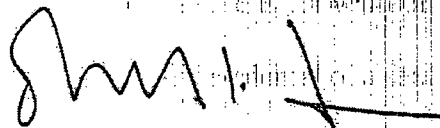
1. Petitioner Juan L. Caballero's petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 (Dkt. No. 1) is **DISMISSED WITHOUT PREJUDICE** for want of jurisdiction;

2. Petitioner failed to make "a substantial showing of the denial of a federal right" and cannot make a substantial showing that this Court's procedural rulings are incorrect as required by Fed. R. App. P. 22 for a certificate of appealability. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Therefore, this Court **DENIES** Petitioner a certificate of appealability. *See* Rule 11(a) of the Rules Governing § 2254 Proceedings; and

3. All remaining motions, if any, are **DENIED**, and this case is now **CLOSED**.

It is so **ORDERED**.

SIGNED this the 24th day of August, 2022.



ORLANDO L. GARCIA
Chief United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

BY JU
DEPUTY

JUAN L. CABALLERO,
TDCJ No. 01501352,

Petitioner,

v.

Civil No. SA-22-CA-0916-OLG

BOBBY LUMPKIN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

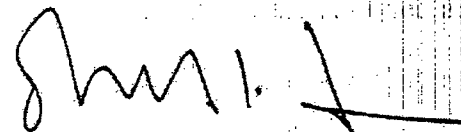
J U D G M E N T

The Court has considered the Judgment to be entered in the above-styled and numbered cause.

Pursuant to this Court's Dismissal Order of even date herewith, **IT IS HEREBY ORDERED, ADJUDGED and DECREED** that the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Dkt. No. 1) filed by Petitioner Juan L. Caballero is **DISMISSED WITHOUT PREJUDICE**. No Certificate of Appealability shall issue in this case. This case is now **CLOSED**.

It is so **ORDERED**.

SIGNED this the 24th day of August, 2022.



ORLANDO L. GARCIA
Chief United States District Judge

- Appendix C -

United States Court of Appeals
for the Fifth Circuit

No. 22-50931

JUAN L. CABALLERO,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice,*
Correctional Institutions Division,

Respondent—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:22-CV-916

UNPUBLISHED ORDER

Before ELROD, GRAVES, and HO, *Circuit Judges.*

PER CURIAM:

A member of this panel previously DENIED Appellant's motions for a Certificate of Appealability, In Forma Pauperis and Appointment of Counsel. The panel has considered Appellant's motion for reconsideration.

IT IS ORDERED that the motion is DENIED.

- Appendix D -