

United States Court of Appeals
for the Fifth Circuit

No. 23-30177

United States Court of Appeals
Fifth Circuit

FILED

May 3, 2023

WESLEY SINCLAIR RICKS,

Lyle W. Cayce
Clerk

Petitioner—Appellant,

versus

TIM HOOPER, *Warden, Louisiana State Penitentiary,*

Respondent—Appellee.

Application for Certificate of Appealability
the United States District Court
for the Western District of Louisiana
USDC No. 3:23-CV-152

ORDER:

Wesley Sinclair Ricks, Louisiana prisoner # 499599, moves for a certificate of appealability (COA) to challenge the dismissal of his 28 U.S.C. § 2254 application challenging his convictions for five counts of first-degree rape and four counts of cruelty to juveniles. The district court dismissed the § 2254 application for lack of jurisdiction as a successive § 2254 application filed without this court's authorization.

To obtain a COA, Ricks must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where, as here, the district court's denial of federal habeas relief is based on procedural


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grounds, a COA will issue only “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 v. McDaniel*, 529 U.S. 473, 484 (2000).

Ricks argues for the first time in his COA motion and brief that the petit jury was not sequestered as required. However, we will not consider issues raised for the first time in a COA motion. *See Black v. Davis*, 902 F.3d 541, 545 (5th Cir. 2018); *Henderson v. Cockrell*, 333 F.3d 592, 605 (5th Cir. 2003).

Ricks also argues that the bill of indictment contained a misjoinder of defenses. However, he does not provide any facts or arguments challenging the district court’s determination that his § 2254 application was a successive application that was filed without this court’s authorization. Accordingly, he has abandoned any challenge to the basis for the district court’s decision. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999); *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993); *Brinkmann v. Dallas Cnty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987).

Ricks has not met the standard for obtaining a COA. Accordingly, his motion for a COA is DENIED.


KURT D. ENGELHARDT
United States Circuit Judge

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION**

WESLEY SINCLAIR RICKS

CIVIL ACTION NO. 23-0152

VS.

SECTION P

JUDGE TERRY A. DOUGHTY

STATE OF LOUISIANA, ET AL.

MAG. JUDGE KAYLA D. MCCLUSKY

REPORT AND RECOMMENDATION

Petitioner Wesley Sinclair Ricks, a prisoner in the custody of Louisiana's Department of Corrections proceeding pro se and in forma pauperis, filed this Petition for Writ of Habeas Corpus on approximately February 3, 2023, under 28 U.S.C. § 2254.¹ [doc. # 1, p. 1]. Petitioner attacks his January 31, 2014, rape² and cruelty-to-juveniles³ convictions, as well as the forty-year and life-without-parole sentences imposed by the Fourth Judicial District Court, Parish of Morehouse.⁴ [doc. # 5, p. 1]. Petitioner also moves for miscellaneous forms of relief pertaining to the merits of his claims. [doc. #s 6, 9, 10, 11]. For the following reasons, the Court should dismiss this Petition without prejudice.

Background

On approximately March 29, 2021, Petitioner filed a petition before this Court under 28 U.S.C. § 2254, attacking the same January 31, 2014, convictions he attacks here. *Wesley*

¹ This matter has been referred to the undersigned for review, report, and recommendation in accordance with 28 U.S.C. § 636 and the standing orders of the Court.

² LA. REV. STAT. § 14:42.

³ LA. REV. STAT. § 14:93.

⁴ According to Petitioner, the state trial court docket number was 12-1299. [doc. # 4, p. 1].

Johnson, 168 F.3d 762, n. 7 (5th Cir. 1999) (citing *Felker v. Turpin*, 518 U.S. 651, 655-58, 662-63 (1996)).

Although the Antiterrorism and Effective Death Penalty Act (“AEDPA”) does not define “second or successive,” the Fifth Circuit has long held that “a later petition is successive when it: (1) raises a claim challenging the petitioner’s conviction or sentence that was or could have been raised in an earlier petition; or (2) otherwise constitutes an abuse of the writ.” *In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998); *Crone v. Cockrell*, 324 F.3d 833, 836 (5th Cir. 2003).⁶ A petition is “second or successive,” under the first prong, if it contains a new claim that the petitioner could have raised in a prior petition and the petitioner’s failure to raise the claim is inexcusable. *McCleskey v. Zant*, 499 U.S. 467, 489 (1991).

Likewise, under the second prong, “a petitioner may abuse the writ by failing to raise a [new] claim through inexcusable neglect” or deliberate abandonment. *Id.*⁷ A “petitioner can abuse the writ by raising a claim in a subsequent petition that he could have raised in his first, regardless of whether the failure to raise it earlier stemmed from a deliberate choice. It is also an abuse of the writ for a prisoner to raise the same claim a second time.” *Beras v. Johnson*, 978 F.3d 246, 252 (5th Cir. 2020). “A federal habeas court’s power to excuse these types of

⁶ “This definition ‘must be considered in the context of AEDPA, the statute that it interprets,’ which is aimed at minimizing repeated attacks on the validity of a petitioner’s conviction or sentence.” *Ramos v. Davis*, 653 F. App’x 359, 363 (5th Cir. 2016) (quoting *Leal Garcia v. Quarterman*, 573 F.3d 214, 221-22 (5th Cir. 2009)). “AEDPA’s ‘design is to further the principles of comity, finality, and federalism,’ to ‘reduce piecemeal litigation,’ and to ‘streamline federal habeas proceedings.’” *Id.* (quoting *Panetti v. Quarterman*, 551 U.S. 930, 945-46 (2007)).

⁷ See also *Slack v. McDaniel*, 529 U.S. 473, 486 (2000) (suggesting that the definition of “second or successive” would be the same under AEDPA as under pre-AEDPA law); *In re Cain*, 137 F.3d 234, 236 (5th Cir. 1998) (indicating that courts should interpret the meaning of “second or successive” using pre-AEDPA abuse-of-the-writ standards).

Key, 205 F.3d 773, 774 (5th Cir. 2000); *Crone v. Cockrell*, 324 F.3d 833, 836 (5th Cir. 2003).

Conclusion

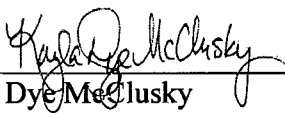
For the reasons above, **IT IS RECOMMENDED** that this proceeding be **DISMISSED WITHOUT PREJUDICE** for lack of jurisdiction.⁹

IT IS FURTHER RECOMMENDED that Petitioner's remaining motions, [doc. #s 6, 9, 10, 11], be **DENIED AS MOOT**.

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Rule 72(b), parties aggrieved by this recommendation have **fourteen (14) days** from service of this Report and Recommendation to file specific, written objections with the Clerk of Court. A party may respond to another party's objections within **fourteen (14) days** after being served with a copy of any objections or response to the district judge at the time of filing.

Failure to file written objections to the proposed factual findings and/or the proposed legal conclusions reflected in this Report and Recommendation within fourteen (14) days following the date of its service, or within the time frame authorized by FED. R. Civ. P. 6(b), shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the District Court, except upon grounds of plain error. See *Douglass v. United Services Automobile Association*, 79 F.3d 1415 (5th Cir. 1996).

In Chambers, Monroe, Louisiana, this 2nd day of March, 2023.



Kayla Dye McClusky
United States Magistrate Judge

⁹Although some district courts have transferred second or successive petitions to the Fifth Circuit for authorization, a transfer is not mandatory. See *In Re Epps*, 127 F.3d 364 (5th Cir. 1997) (adopting a procedure to be used when a successive petition filed without prior authorization is transferred). Dismissal, rather than transfer, is warranted here.

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION**

WESLEY SINCLAIR RICKS

CIVIL ACTION NO. 23-0152

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SECTION P

JUDGE TERRY A. DOUGHTY

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MAG. JUDGE KAYLA D. MCCLUSKY

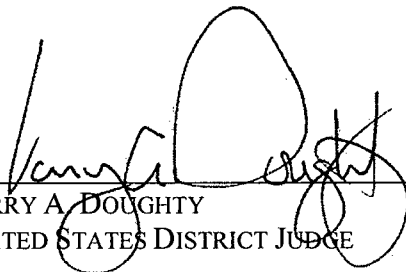
JUDGMENT

The Report and Recommendation of the Magistrate Judge [Doc. No. 12] having been considered, no objections thereto having been filed, and finding that same is supported by the law and the record in this matter,

IT IS ORDERED, ADJUDGED, AND DECREED that this proceeding is
DISMISSED WITHOUT PREJUDICE for lack of jurisdiction.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Petitioner's
remaining Motions [Doc. Nos. 6, 9, 10, 11] are **DENIED as moot**.

MONROE, LOUISIANA, this 22nd day of March 2023.


TERRY A. DOUGHTY
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
for the Fifth Circuit

No. 23-30177

WESLEY SINCLAIR RICKS,

Petitioner—Appellant,

versus

TIM HOOPER, *Warden, Louisiana State Penitentiary,*

Respondent—Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 3:23-CV-152

UNPUBLISHED ORDER

Before HAYNES, ENGELHARDT, and OLDHAM, *Circuit Judges.*

PER CURIAM:

A member of this panel previously DENIED Appellant's Motion for a Certificate of Appealability. The panel has considered Appellant's motion for reconsideration.

IT IS ORDERED that the motion is DENIED.

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