

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

August 5, 2024

Lyle W. Cayce
Clerk

No. 24-20169

VICTOR CHARLES ROGERS,

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 Southern District of Texas
USDC No. 4:24-CV-817

ORDER:

Victor Charles Rogers, Texas prisoner #0602346, seeks a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2254 petition for lack of jurisdiction because Rogers had not received this court's authorization to file a successive application.

Because the district court's dismissal was based on a procedural issue, a COA cannot issue unless Rogers demonstrates both "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

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whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Rogers does not challenge that his current petition is successive and that he failed to obtain authorization to file it pursuant to 28 U.S.C. § 2244(b)(3)(A). He instead argues that he is actually innocent, which he contends operates as a gateway to permit federal review of his claims. Rogers has not shown “that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack*, 529 U.S. at 484. His motion for a COA is DENIED.


IRMA CARRILLO RAMIREZ
United States Circuit Judge

ENTERED

March 27, 2024

Nathan Ochsner, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VICTOR CHARLES ROGERS,
TDCJ # 00602346,

Petitioner,

VS.

BOBBY LUMPKIN,

Respondent.

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CIVIL ACTION NO. 4:24-0817

MEMORANDUM OPINION AND ORDER

State inmate Victor Charles Rogers has filed a petition for habeas corpus under 28 U.S.C. § 2254 (Dkt. 1) and a supporting memorandum (Dkt. 2). Having reviewed this matter under 28 U.S.C. § 2241, *et seq.*, and Rule 4 of the Rules Governing § 2254 Cases in the United States District Courts, and having considered the pleadings, the applicable law, and all matters of record, the Court will **DISMISS** this case for the reasons explained below.

I. BACKGROUND

Rogers is serving a 38-year sentence imposed in 1991 in the 228th District Court of Harris County, Case No. 590057. *See* Dkt. 1; Inmate Information Search, Texas Department of Criminal Justice, available at <https://inmate.tdcj.texas.gov/InmateSearch> (last visited Mar. 26, 2024); Records Search, Harris County District Clerk, <https://www.hcdistrictclerk.com/Edocs/Public/search.aspx> (last visited Mar. 26, 2024).

His current petition challenges his 1991 conviction, claiming that (1) the prosecution

violated his rights when introducing DNA evidence; and (2) he was constructively denied counsel at his trial (Dkt. 1, at 5-7). His supporting memorandum argues that the trial record “speak[s] for itself” and contains all information supporting his claims (Dkt. 2, at 9).

Rogers previously filed a federal habeas petition challenging his 1991 conviction and raised two claims: (1) his conviction violated due process because certain identification evidence was erroneously admitted, and (2) his trial counsel rendered ineffective assistance. On June 28, 1995, the district court denied his claims on the merits and dismissed his petition. *See Rogers v. Scott*, Civil Action No. 4:94-2953 (S.D. Tex. June 28, 1995), *appeal dismissed*, Appeal No. 95-20656 (Sept. 11, 1995).

II. DISCUSSION

This case is governed by the Anti-Terrorism and Effective Death Penalty Act (AEDPA), codified as amended at 28 U.S.C. § 2241 *et seq.* AEDPA imposes restrictions on “second or successive” applications for habeas relief. Before a second or successive application permitted by AEDPA may be filed in the district court, the applicant must move in the appropriate court of appeals for an order authorizing the district court to consider the application. *See* 28 U.S.C. § 2244(b)(3)(A). If a pending petition qualifies as a successive writ application, this court has no jurisdiction to consider it absent prior authorization from the Fifth Circuit. “Indeed, the purpose of [28 U.S.C. § 2244(b)] was to eliminate the need for the district courts to repeatedly consider challenges to the same conviction unless an appellate panel first found that those challenges had some merit.” *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000) (citing *In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998)).

A prisoner's application is not "second or successive" merely because it follows an earlier petition, but rather when it either: (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." *Cain*, 137 F.3d at 235; see *Adams v. Thaler*, 679 F.3d 312, 322 (5th Cir. 2012). If a claim in a second or successive petition was presented in a previous petition, it must be dismissed. 28 U.S.C. § 2244(b)(1). If a claim in a second or successive petition was not presented in a previous petition, it must be dismissed unless the petitioner satisfies the following standard:

- (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; *or*
- (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) (emphasis added).

Rogers' current petition challenging his 1991 conviction meets the second-or-successive criteria. See *Crone v. Cockrell*, 324 F.3d 833, 837-38 (5th Cir. 2003). To the extent his petition re-urges habeas claims that were dismissed in his earlier federal proceedings, his claims must be dismissed under 28 U.S.C. § 2244(b)(1). To the extent he argues that he brings new claims that could not have been previously discovered, this Court lacks jurisdiction over his claims because he has not directed the Court's attention to any

order from the Fifth Circuit authorizing the filing of his petition. Therefore, even assuming that Rogers could satisfy the strict standards in 28 U.S.C. § 2244(b)(2) for new claims, this Court would lack jurisdiction over the claims. *See* 28 U.S.C. § 2244(b)(3)(A); *Adams*, 679 F.3d at 321; *Crone*, 324 F.3d 837-38.

For the reasons stated above, the Court will dismiss this habeas action as an unauthorized successive writ.

III. CERTIFICATE OF APPEALABILITY

Habeas corpus actions under 28 U.S.C. § 2254 or § 2255 require a certificate of appealability to proceed on appeal. 28 U.S.C. § 2253(c)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). Rule 11 of the Rules Governing Section 2254 Cases requires a district court to issue or deny a certificate of appealability when entering a final order that is adverse to the petitioner.

A certificate of appealability will not issue unless the petitioner makes “a substantial showing of the denial of a constitutional right,” 28 U.S.C. § 2253(c)(2), which requires a petitioner to demonstrate ““that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.”” *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Under the controlling standard, a petitioner must show “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Miller-El*, 537 U.S. at 336 (cleaned up). Where denial of relief is based on procedural grounds, the petitioner must show not only that “jurists of reason would find it debatable whether the

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district court was correct in its procedural ruling” but also that the jurists “would find it debatable whether the petition states a valid claim of the denial of a constitutional right.” *Slack*, 529 U.S. at 484; *see Pierre v. Hooper*, 51 F.4th 135, 137 (5th Cir. 2022) (a certificate of appealability may not issue based solely on a debatable procedural ruling).

A district court may deny a certificate of appealability, *sua sponte*, without requiring further briefing or argument. *Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000). After careful review of the pleadings and the applicable law, the Court concludes that reasonable jurists would not find its assessment of the claims debatable or wrong. Because the petitioner does not allege facts showing that his claims could be resolved in a different manner, a certificate of appealability will not issue in this case.

IV. CONCLUSION

Based on the foregoing, the Court **ORDERS** as follows:

1. This habeas action is **DISMISSED** without prejudice as an unauthorized successive petition.
2. All pending motions are **DENIED as moot**.
3. A certificate of appealability is **DENIED**.

The Clerk will provide copies of this order to the parties.

SIGNED at Houston, Texas, on March 27, 2024.



GEORGE C. HANKS, JR.
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
for the Fifth Circuit

No. 24-20169

United States Court of Appeals
Fifth Circuit

FILED

October 9, 2024

Lyle W. Cayce
Clerk

VICTOR CHARLES ROGERS,

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 Southern District of Texas
USDC No. 4:24-CV-817

UNPUBLISHED ORDER

Before HO, WILSON, and RAMIREZ, *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.