

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

DAVID LEE LONG, #204 928

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Petitioner,

*

v.

*

2:10-CV-533-TMH
[WO]

GARY HETZEL, *et al.*,

*

Respondents.

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ORDER

This case is before the court on a Recommendation (*Doc. #4*) filed by the Magistrate Judge, which recommends dismissal of the instant petition pursuant to 28 U.S.C. § 2244(b)(3)(A) due to Petitioner's failure to obtain the requisite order from the Eleventh Circuit Court of Appeals authorizing a federal district court to consider his successive habeas application. Petitioner has filed an objection to the Recommendation. (*Doc. #5.*) The court, therefore, engages in a *de novo* review of the record.

Petitioner maintains in his objection that the claims presented in his application for habeas corpus relief rest on grounds of newly discovered evidence and a violation of the Equal Protection Clause. He states that the ends of justice will be served if the court dismisses his habeas petition without prejudice so that he may seek permission from the Eleventh Circuit Court of Appeals to file a successive petition. (*Doc. #5.*)

The Recommendation of the Magistrate Judge does not recommend dismissal of the

instant petition with prejudice. Should a three-judge panel of the Eleventh Circuit Court of Appeals authorize this court to consider a successive application for habeas relief filed by Petitioner wherein he seeks to challenge his conviction under Ala. Code § 13A-5-40(a)(17), the language used by this court in the instant proceeding will not prevent Petitioner from doing so.

Petitioner's present habeas application cannot be considered unless the Eleventh Circuit Court of Appeals authorizes the court to consider a successive petition. Accordingly, Petitioner's objection is due to be overruled and the Recommendation adopted.

After an independent review of the file, it is the ORDER, JUDGMENT, and DECREE of the court that:

1. Petitioner's objection (*Doc. #5*) to the Recommendation of the Magistrate Judge filed on July 8, 2010 is overruled;
2. The Recommendation of the Magistrate Judge (*Doc. #4*) filed on June 24, 2010 is adopted;
3. The 28 U.S.C. § 2254 petition for habeas corpus relief filed by Petitioner is DENIED;
4. This cause of action is DISMISSED without prejudice in accordance with the provisions of 28 U.S.C. § 2244(b)(3)(A) as Petitioner has failed to obtain the requisite order from the Eleventh Circuit Court of Appeals authorizing a federal district court to consider his successive habeas application.

DONE, this 21st day of September, 2010.

Truman M. Hobbs
TRUMAN M. HOBBS
SENIOR UNITED STATES DISTRICT JUDGE