

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

HUGO DAVID GOMEZ,
Petitioner,
v.
GREG LEWIS, Warden,
Respondent.

No. CV 13-7398-R (PLA)
**ORDER TO SHOW CAUSE RE: DISMISSAL
OF SUCCESSIVE PETITION**

On October 7, 2013, petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody under 28 U.S.C. § 2254 (the "Petition") in the United States District Court for the Central District of California. In the Petition, petitioner challenges his 1997 conviction in the Los Angeles County Superior Court. The Court observes that on December 28, 2000, petitioner filed an earlier habeas petition in this Court, in Case No. CV 00-13507-R (FMO), in which he also challenged his 1997 conviction. The 2000 petition was dismissed with prejudice in a June 3, 2002, Order adopting the findings and conclusions of the Magistrate Judge. (See Order Adopting Findings, Conclusions and Recommendations of United States Magistrate Judge in Case No. CV 00-13507-R (FMO) ("2002 Order")).

A federal habeas petition is successive if it raises claims that were or could have been adjudicated on the merits in a previous petition. Cooper v. Calderon, 274 F.3d 1270, 1273 (9th

1 Cir. 2001) (per curiam), cert. denied, 538 U.S. 984, 123 S.Ct. 1793 (2003). The Antiterrorism and
2 Effective Death Penalty Act of 1996 (“AEDPA”) provides that a claim presented in a second or
3 successive federal habeas petition that was not presented in a prior petition shall be dismissed
4 unless:

5 (A) the applicant shows that the claim relies on a new rule of
6 constitutional law, made retroactive to cases on collateral review by
7 the Supreme Court, that was previously unavailable; or

8 (B)(i) the factual predicate for the claim could not have been
9 discovered previously through the exercise of due diligence; and

10 (ii) the facts underlying the claim, if proven and viewed in light of the
11 evidence as a whole, would be sufficient to establish by clear and
12 convincing evidence that, but for constitutional error, no reasonable
13 factfinder would have found the applicant guilty of the underlying
14 offense.

15 28 U.S.C. § 2244(b)(2)(A), (B).

16 Furthermore, “[b]efore a second or successive application permitted by this section is filed
17 in the district court, the applicant shall move in the appropriate court of appeals for an order
18 authorizing the district court to consider the application.” 28 U.S.C. § 2244(b)(3)(A).

19 In his 2000 federal habeas challenge, petitioner raised the claim that the trial court erred
20 in failing to instruct the jury, sua sponte, on voluntary manslaughter on the theories of
21 unreasonable self-defense and heat of passion. (See Report and Recommendation of United
22 States Magistrate Judge in Case No. CV 00-13507-R (FMO) at 9). The action was considered on
23 the merits and dismissed with prejudice. (See id. at 11-16; 2002 Order).

24 In the instant Petition, petitioner challenges the same conviction that he challenged in his
25 2000 Petition, setting forth the following grounds for relief: (1) “trial counsel’s alleged
26 incompetence before trial, during trial;” (2) “trial counsel’s failure to investigate and present the
27 potentially meritorious mental illness;” (3) “trial counsel’s failure to investigate intoxication defense
28 not ‘tactical choice;” (4) “the ineffectiveness of counsel as prejudicial to petitioner;” (5) “trial
counsel’s incompetence during counsel’s obligation regarding [jury] instructions.” (Petition at
pages “5 of 11” and “6 of 11”). Even if petitioner’s claims in the instant Petition satisfied the
AEDPA standards for filing a successive petition (although it does not appear that they satisfy

1 U.S.C. § 2244(b)(2)(A) or (B)), he nevertheless is required to first seek authorization from the
2 Ninth Circuit before filing a successive petition. 28 U.S.C. § 2244(b)(3)(A). Here, there is no
3 indication that petitioner has obtained such permission from the Ninth Circuit. See Burton v.
4 Stewart, 549 U.S. 147, 153, 127 S.Ct. 793, 166 L.Ed.2d 628 (2007) (AEDPA requires petitioner
5 to receive authorization from the Court of Appeals before filing a second habeas petition). It
6 therefore appears that the Court is without jurisdiction to entertain the current Petition under 28
7 U.S.C. § 2244(b). See id.; Cooper, 274 F.3d at 1274 (“When the AEDPA is in play, the district
8 court may not, in the absence of proper authorization from the court of appeals, consider a second
9 or successive habeas application.”) (citation omitted).

10 Accordingly, petitioner is **ordered to show cause** why the instant Petition should not be
11 dismissed as successive. Specifically, **no later than October 31, 2013**, petitioner must submit
12 to the Court documentation showing that, pursuant to 28 U.S.C. § 2244(b)(3)(A), he properly filed
13 a motion in the Ninth Circuit for an order authorizing the district court to consider a successive
14 petition, and that the Ninth Circuit issued such an order. **Failure to respond by October 31,**
15 **2013, will result in the instant Petition being summarily dismissed without prejudice.**¹ See
16 Reyes v. Vaughn, 276 F.Supp.2d 1027, 1029-30 (C.D. Cal. 2003) (dismissing successive petition
17 without prejudice to petitioner’s right to seek authorization from the Ninth Circuit).

18 **IT IS SO ORDERED.**

19 

20 DATED: October 10, 2013

21 _____
22 PAUL L. ABRAMS
23 UNITED STATES MAGISTRATE JUDGE

24 ¹ In the event that petitioner has not complied with 28 U.S.C. § 2244(b)(3)(A), and he
25 does not provide documentation showing that he is not required to first receive Ninth Circuit
26 authorization before filing a successive petition, he is advised that if he wishes to make a
27 successive habeas application, he must file a “Motion for Order Authorizing District Court to
28 Consider Second or Successive Petition Pursuant to 28 U.S.C. § 2244(b)(3)(A)” directly with the
Ninth Circuit. Until the Ninth Circuit issues such an order, any direct or implied request for a
second or successive petition for writ of habeas corpus is barred by § 2244(b) and must be
dismissed **without prejudice** to petitioner’s right to seek authorization from the Ninth Circuit to
file the petition.