

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

**IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

JOHN KELLER,
Petitioner,
v.
BAUGHMAN, Warden,
Respondent.

Case No. CV 16-4605 RGK (MRW)

**ORDER DISMISSING SUCCESSIVE
HABEAS ACTION**

The Court summarily dismisses this action pursuant to the successive habeas petition rule in 28 U.S.C. § 2244.

* * *

This is a state habeas action. Petitioner is currently serving a 15-year term in state prison following his no contest plea to an attempted robbery charge.

This is his third habeas action in federal court challenging that conviction. In Petitioner’s first action, he raised issues regarding ineffective assistance of counsel, his mental status at the time of his plea, and the sentence imposed upon him. (Keller v. Gibson, No. CV 14-2331 RGK (MRW) (C.D. Cal.)) In late 2014, the Court dismissed the first habeas action with prejudice for raising issues that

1 were Tollett-barred by his plea. (Keller, No. 14-2331, Docket # 33.) The United
2 States Court of Appeals for the Ninth Circuit denied a certificate of appealability.
3 (Keller v. Gibson, No. 14-56835 (9th Cir.))

4 Petitioner then filed another action in this Court raising similar challenges to
5 his conviction. (Keller v. Davey, No. CV 15-2838 RGK (MRW) (C.D. Cal.)) The
6 Court concluded that Petitioner’s second action was successive and not filed with
7 advance permission from the appellate court. The Court summarily dismissed the
8 action.

9 Petitioner commenced the present habeas action in this Court in June 2016.
10 This third action appears to present similar claims regarding the legality of
11 Petitioner’s guilty plea and conviction. As before, the petition is not accompanied
12 by a statement of permission from the Court of Appeals.

13 Magistrate Judge Wilner screened Petitioner’s current petition. (Docket
14 # 5.) As in the earlier action, the magistrate judge explained the successive-
15 petition-authorization rule to Petitioner. The magistrate judge directed Petitioner
16 to submit a statement as to why the action should not be summarily dismissed.
17 Petitioner failed to file any such statement in response.

18 * * *

19 If it “appears from the application that the applicant or person detained is not
20 entitled” to habeas relief, a court may dismiss a habeas action without ordering
21 service on the responding party. 28 U.S.C. § 2243; see also Rule 4 of Rules
22 Governing Section 2254 Cases in United States District Courts (petition may be
23 summarily dismissed if petitioner plainly not entitled to relief); Local Civil
24 Rule 72-3.2 (magistrate judge may submit proposed order for summary dismissal
25 to district judge “if it plainly appears from the face of the petition [] that the
26 petitioner is not entitled to relief”).

27 Under federal law, a state prisoner is generally required to present all
28 constitutional challenges to a state conviction in a single federal action. A habeas

1 petition is second or successive – and subject to summary dismissal under
2 28 U.S.C. § 2244(b) – when the petition “raises claims that were or could have
3 been adjudicated on the merits” in the first action. McNabb v. Yates, 576 F.3d
4 1028, 1029 (9th Cir. 2009). A prisoner must obtain authorization from the Court
5 of Appeals to pursue such a successive habeas petition before the new petition may
6 be filed in district court. 28 U.S.C. § 2244(b)(3); Burton v. Stewart, 549 U.S. 147
7 (2007) (dismissing successive petition for failure to obtain authorization from court
8 of appeals).

9 * * *

10 The current action is successive. Petitioner previously challenged his
11 conviction in this Court in 2014. His petition was denied; the appellate court
12 declined to review that decision. Petitioner filed a second, successive action in
13 2015 without permission from the appellate court. That action was dismissed as
14 required by the statute.

15 The present action – Petitioner’s third – is also successive and filed without
16 permission. The petition is subject to summary dismissal. 28 U.S.C. § 2244(b)(3).
17 The action is therefore DISMISSED without prejudice.

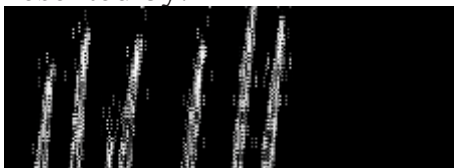
18 IT IS SO ORDERED.

19
20 Dated: August 25, 2016

Gary Klausner

21 HON. R. GARY KLAUSNER
22 UNITED STATES DISTRICT JUDGE

23 Presented by:



24
25
26
27 HON. MICHAEL R. WILNER
28 UNITED STATES MAGISTRATE JUDGE