

**FILED**  
**United States Court of Appeals**  
**Tenth Circuit**

**UNITED STATES COURT OF APPEALS**  
**FOR THE TENTH CIRCUIT**

**September 29, 2023**

**Christopher M. Wolpert**  
**Clerk of Court**

---

TRACY SPENCER, a/k/a Jahad Ali,

Petitioner - Appellant,

v.

WARDEN BURTLOW; THE  
ATTORNEY GENERAL OF THE STATE  
OF COLORADO, Phil Weiser,

Respondents - Appellees.

No. 23-1210  
(D.C. No. 1:22-CV-02486-LTB-KLM)  
(D. Colo.)

---

**ORDER DENYING CERTIFICATE OF APPEALABILITY\***

---

Before **HOLMES**, Chief Judge, **KELLY** and **MORITZ**, Circuit Judges.

---

Tracy Spencer, a Colorado prisoner proceeding pro se, seeks a certificate of appealability (COA) to appeal the district court’s dismissal of his unauthorized second or successive 28 U.S.C. § 2254 application for lack of jurisdiction. We deny a COA and dismiss this matter.

**I. Background**

In 1986, Mr. Spencer pleaded guilty to one count of first-degree murder and one count of second-degree murder. He was sentenced to life imprisonment for the first-

---

\* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

degree murder count and a consecutive twenty-four year term for the second-degree murder count.

In 2006, after his efforts to obtain postconviction relief in state court failed, Mr. Spencer filed a § 2254 application in federal district court. He claimed he received ineffective assistance of counsel and that the loss or destruction of his attorney's case file violated his right to due process. The district court denied relief and this court denied a COA. *See Spencer v. Milyard*, 291 F. App'x 173, 174 (10th Cir. 2008).

In 2022, Mr. Spencer filed the § 2254 application at issue here. He claimed he is actually innocent and that counsel was ineffective for failing to investigate alternate suspects and failing to obtain DNA evidence from his co-defendants and other exculpatory evidence. A magistrate judge concluded that the application was an unauthorized second or successive § 2254 application and recommended that it be dismissed for lack of jurisdiction. The district court overruled Mr. Spencer's objections and adopted the magistrate judge's recommendation.

## II. Discussion

To appeal the district court's order, Mr. Spencer must obtain a COA. *See* 28 U.S.C. § 2253(c)(1)(B). To obtain a COA where, as here, a district court dismisses a § 2254 application on procedural grounds, the petitioner must show "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).

A prisoner may not file a second or successive § 2254 application unless he first obtains an order from the circuit court authorizing the district court to consider the

petition. 28 U.S.C. § 2244(b)(3)(A). Absent such authorization, a district court lacks jurisdiction to address the merits of a second or successive § 2254 application. *In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008) (per curiam).

Because Mr. Spencer represents himself, we liberally construe his combined opening brief and application for a COA. *See Hall v. Scott*, 292 F.3d 1264, 1266 (10th Cir. 2002) But he does not dispute that he previously filed a § 2254 motion and that he did not obtain authorization from this court to file another one. And his assertion that his underlying claims have not been considered, are meritorious, and deserve review does not establish that the district court’s procedural ruling—its dismissal of his application as successive and unauthorized—is debatable.

### III. Conclusion

Because Mr. Spencer has not shown that jurists of reason would debate whether the district court’s procedural ruling was correct, we deny a COA and dismiss this matter. We grant his motion to proceed without prepayment of filing fees.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk