

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CHRIS G. GILKERS

CIVIL ACTION

VERSUS

NO. 05-0841

N. BURL CAIN, WARDEN

SECTION "K"(2)

ORDER AND REASONS

Before the Court is an "Application for Rule 60(b) Motion"(Doc. 30) and a "Motion for Appointment of Counsel Pursuant to Section 3599(a)(2) (Doc. 31). Having reviewed the pleadings, memoranda, and the relevant law, the Court, for the reasons assigned, **DENIES** the motion.

This motion is Chris Gilker's fourth attempt at filing a habeas petition. As this Court previously noted in its Order and Opinion of March 15, 2012 denying a successive, the procedural history of this matter is set forth in detail in the Report and Recommendation prepared by Magistrate Judge Joseph A. Wilkinson, Jr. (Doc. 7), only the background relevant to this motion is included herein.

On May 16, 2001, a state court jury convicted Chris G. Gilkers of the second degree murder (La. Rev. Stat. 14:30.1). The state district judge sentenced Gilkers to a term of life imprisonment without benefit of parole, probation, or suspension of sentence. Gilkers appealed his conviction. The Louisiana Fifth Circuit Court of Appeals affirmed Gilkers's conviction. *State v. Gilkers*, 820 So.2d 1152 (La. App. 5th 2002). Thereafter Gilkers filed a writ application with the Louisiana Supreme Court seeking review of his direct appeal. The Louisiana Supreme Court denied writs. *State v. Gilkers*, 845 So.2d 1087 (La. 2003).

Thereafter, Gilkers filed a *pro se* application for post conviction relief with the state district court. The state district court denied the application. The Louisiana Fifth Circuit Court

of Appeals, denied Gilkers's application for writs. *State v. Gilkers*, No. 03-KH-1427 (La. App. 5th 1215/03). The Louisiana Supreme Court also denied Gilkers's application for writs. *State ex rel Gilkers v. State*, 889 So.2d 256 (La. 2005).

After exhausting his state post-conviction remedies, Gilkers filed a petition for federal *habeas corpus* relief, which this Court denied. *Gilkers v. Cain*, No. 05-841 (May 30, 2006)(Doc. 12). The United States Court of Appeals for the Fifth Circuit denied Gilkers's request for a certificate of appealability. *Gilkers v. Cain*, No. 06-30678 (5th Cir. 5/21/07)¹. The Supreme Court denied Gilker's petition for a writ of *certiorari*. *Gilkers v. Cain*, No. 07-5432 (10/12/07).²

Several years later Gilkers filed in this Court a second or successive petition for writ of *habeas corpus* which this Court transferred to the United States Fifth Circuit Court of Appeals under the authority of 28 U.S.C. §1631 for a determination of whether Gilkers was authorized under 28 U.S.C. §2244(b) to file the second or successive petition in this Court. *Gilkers v. Cain*, No. 11-1019 (5/10/11)(Doc. 2). The Fifth Circuit denied Gilkers's motion for authorization to file a successive §2254 application for *habeas corpus* relief. *Gilkers v. Cain*, No. 11-30451 (5th Cir. 8/31/11).

Gilkers then filed a "Motion for Relief from Judgment and Order Pursuant to the Rules of Civil Procedure 60(b)" seeking relief from this Court's May 30, 2006 judgment denying his first application for federal *habeas* relief which in essence was his third attempt to seek post-conviction relief in federal court. Gilkers contended in that petition that the internal procedures used by the Louisiana Fifth Circuit Court of Appeals in denying his *pro se* application for a

¹Doc. 19 in this record.

² Doc. 21 in this record.

supervisory writ following the state district court's denial of his application for post-conviction relief effectively denied him review by a judge and amounted to "discriminational practices against pro se and indigent litigants seeking review (and justice) in the court."³ Doc. 22, p. 5. Additionally, Gilkers asserted that the internal procedures of the Louisiana Fifth Circuit Court of Appeals denied him due process and equal protection of the laws.

This Court denied the motion finding that before Gilkers's motion could be considered on the merits by this Court, Gilkers had to obtain authorization to file that second or successive petition from the United States Fifth Circuit Court of Appeals by making a prima facie showing to that appellate court of the satisfaction of the requirements of 28 U.S.C. §2244 (b)(2). As such, the Court found that it lacked jurisdiction to proceed.

This Court also noted that Gilkers was not entitled to the post-conviction relief sought as his challenge was based on alleged infirmities in the state's review of his collateral challenge to his conviction citing *Nichols v. Scott*, 69 F.3d 1255, 1275 (5th Cir. 1995) (errors in a state habeas proceeding cannot serve as a basis for setting aside a valid original conviction. An attack on a state habeas proceeding does not entitle the petitioner to habeas relief in respect to his conviction, as it is an attack on a proceeding collateral to the detention and not the detention itself). On September 6, 2012, the United States Fifth Circuit Court of Appeals again denied his request for a certificate of appealability and his motion to proceed in forma pauperis on appeal. *Gilkers v. Cain*, No. 12-30360 (7/12/12).⁴

³ For general information concerning the challenged internal procedures see *Severin v. Parish of Jefferson*, 2009 WL 1107713 (E.D. La. April 23, 2009)(Africk, J.).

⁴Doc. 29 in this record.

This fourth attempt at relief is premised on *Louie M. Schexnayder v. Cain*, No. 13-30981 (7/8/2014). This case allowed a preliminary grant of a certificate of appealability on the issue of whether the situation underlying *State of Louisiana v. Cordero*, 933 So.2d 203 (La. 2008), created a "defect in the integrity" of a prior federal habeas proceeding which would give the federal district court a reason to reconsider its prior merits ruling under Rule 60, specifically subparts (b)(5) and (6). At this time, the *Schexnayder* matter is scheduled for oral argument before the Fifth Circuit sometime in April. Thus, there is no pronouncement by the Fifth Circuit on this issue of law at this time.

Considering that Gilkers' first petition was denied on the merits, that his second petition was based on the infirmities addressed in the *Cordero* matter, and that the Fifth Circuit denied him a certificate of appealability with respect to that petition, the instant Rule 60(b) motion must likewise be considered an attempt to file a prohibited successive petition. There has been no ruling that would lift the requirement that Chris Gilkers must first seek leave of the Fifth Circuit to file this petition. Accordingly,

IT IS ORDERED that "Application for Rule 60(b) Motion"(Doc. 30) and a "Motion for Appointment of Counsel Pursuant to Section 3599(a)(2) (Doc. 31) are **DENIED**.

New Orleans, Louisiana, this 21st day of March, 2016.



STANWOOD R. DUVAL, JR.
UNITED STATES DISTRICT JUDGE