

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT



No. 17-10939

A True Copy
Certified order issued Jun 08, 2018

Jeff W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

THOMAS WAYNE FLORENCE,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Northern District of Texas

O R D E R:

Thomas Wayne Florence, Texas prisoner # 1729344, seeks a certificate of appealability (COA) to challenge the district court's dismissal of his 28 U.S.C. § 2254 petition concerning his conviction for sexual assault of a child. Florence asserts that he is actually innocent and that his rights under the Due Process Clause were violated because his conviction was obtained on the basis of false evidence, prosecutorial misconduct, and insufficient evidence.

To obtain a COA, Florence must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court has dismissed a § 2254 petition on procedural grounds, the COA applicant must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and 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). Florence has not made the requisite showing. *See id.*; *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *see also In re Cain*, 137 F.3d 234, 235-36 (5th Cir. 1998). Specifically, reasonable jurists would not debate whether Florence’s instant § 2254 petition, which was filed before this court denied his motion for a COA as to his previous § 2254 petitions, raised claims that could have been presented previously and whether the application thus constituted an abuse of the writ. *See Crone v. Cockrell*, 324 F.3d 833, 836-37 (5th Cir. 2003). Accordingly, Florence’s COA motion and motion for leave to proceed in forma pauperis are DENIED.

Florence also has filed a number of other motions with this court. These motions are numerous, repetitive and, in some respects, unrelated to the instant matter. All of Florence’s outstanding motions are DENIED. Finally, Florence is again WARNED that the filing of frivolous, repetitive, or otherwise abusive pleadings will invite the imposition of sanctions, which may include dismissal, monetary sanctions, and restrictions on his ability to file pleadings in this court and any court subject to this court’s jurisdiction. Florence is also again INSTRUCTED to review all pending matters in this court and in any court under this court’s jurisdiction and move to dismiss any motions that are repetitive, frivolous, unrelated, or abusive.

MOTIONS DENIED; SANCTION WARNING ISSUED.

/s/ James E. Graves, Jr.

JAMES E. GRAVES, JR.
UNITED STATES CIRCUIT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION**

THOMAS WAYNE FLORENCE,

Petitioner,

v.

**LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,**

Respondent.

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Civil No. 7:17-CV-081-O

**ORDER ACCEPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE**

After making an independent review of the pleadings, files, and records in this case, of the Findings, Conclusions, and Recommendation of the United States Magistrate Judge, and of Petitioner's objections thereto, I am of the opinion that the findings of fact, conclusions of law, and reasons for denial set forth in the Magistrate Judge's Recommendation are correct and they are hereby adopted and incorporated by reference as the Findings of the Court.

As noted by the Magistrate Judge, Petitioner's prior habeas action, challenging the same conviction at issue in the instant case, was dismissed and is currently pending on appeal. *See Florence v. Stephens*, No. 3:14-CV-376 (S.D. Tex. 2016), *appeal pending sub nom. Florence v. Davis*, No. 16-40615 (5th Cir.).

On April 18, 2017, the United States Court of Appeals for the Fifth Circuit denied Petitioner's motion to file a successive habeas petition as premature because the appeal from his first petition remains pending. *See In re: Thomas W. Florence*, No. 16-41294 (5th Cir. 2017). The instant petition is therefore subject to dismissal because Petitioner does not have permission to file

a successive petition and because any such request would be premature at this time. Moreover, Petitioner might obtain the relief he seeks in the appeal of his prior habeas action which could render the grounds for relief set forth in the instant petition moot.

Accordingly, the petition for writ of habeas corpus is **DISMISSED** without prejudice to Petitioner's right to seek leave to file a successive petition after the issues pending in the appeal of his prior habeas action are resolved.

SO ORDERED this 27th day of July, 2017.


Reed O'Connor
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION**

THOMAS WAYNE FLORENCE,
TDCJ No. 01729344, AI 486,

Petitioner,

V.

**LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,**

Respondent.

Civil Action No. 7:17-cv-00081-O-BP

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Before the Court is an Amended Petition for Writ of Habeas Corpus filed by Petitioner Thomas Wayne Florence pursuant to 28 U.S.C. § 2254. ECF No. 13. Petitioner seeks to challenge his state conviction of sexual assault. *Id.* at 2. After consideration of the pleadings and the applicable law, the undersigned RECOMMENDS that United States District Judge Reed O'Connor DISMISS without prejudice the Amended Petition for Writ of Habeas Corpus (ECF No. 13) as successive.

Petitioner, an inmate confined in the James V. Allred Unit of the Texas Department of Criminal Justice in Iowa Park, Texas, brings this action pursuant to 28 U.S.C. § 2254. Petitioner challenges the validity of his conviction in case 10CR1217 from the 56th District Court in Galveston County, Texas. ECF No. 13 at 2. This is the same conviction that Petitioner challenged in his previous case, *Florence v. Stephens*, No. 3:14-cv-00376 (S.D. Tex. 2014), which is currently pending on appeal. *See Florence v. Davis*, No. 16-40615 (5th Cir.). In the earlier case, Petitioner's

petition for writ of habeas corpus, which was consolidated with his two other then-pending habeas proceedings attacking the same conviction (3:15-cv-00127 and 3:15-cv-00128), was dismissed with prejudice. *Florence v. Stephens*, No. 3:14-cv-00376 (S.D. Tex. 2014) (ECF No. 90). The court determined that Petitioner was not entitled to habeas relief. *Id.*

The Antiterrorism and Effective Death Penalty Act of 1996 limits the circumstances under which a state prisoner may file a second or successive application for habeas relief in federal court. In general, a later petition is successive when it raises a claim challenging the petitioner's conviction or sentence that was or could have been raised in an earlier petition or otherwise constitutes an abuse of the writ. *Leal Garcia v. Quarterman*, 573 F.3d 214, 222 (5th Cir. 2009); *Crone v. Cockrell*, 324 F.3d 833, 836-37 (5th Cir. 2003). The claims set forth in the instant petition were raised, or could have been raised, in Petitioner's earlier petition.

When a petition is second or successive, the petitioner must seek an order from the Fifth Circuit Court of Appeals that authorizes this Court to consider the petition. *See* 28 U.S.C. § 2244(b)(3)(A). Because the instant petition is successive, this Court is without jurisdiction to entertain the petition unless leave to file is granted by the Fifth Circuit. *See Crone*, 324 F.3d at 836-37. The District Court may opt to transfer a successive habeas petition to the United States Court of Appeals for the Fifth Circuit pursuant to *Henderson v. Haro*, 282 F.3d 862, 864 (5th Cir. 2002) and *In re Epps*, 127 F.3d 364, 365 (5th Cir. 1997). However, because the earlier case was already ruled on by the Southern District of Texas and is already before the Fifth Circuit on appeal, the undersigned RECOMMENDS that Judge O'Connor not transfer the instant case and instead DISMISS without prejudice the Amended Petition (ECF No. 13) as successive.

A copy of this Findings, Conclusions, and Recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of this Findings, Conclusions,

and Recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b)(1). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc).

Signed July 12, 2017.



Hal R. Ray, Jr.
UNITED STATES MAGISTRATE JUDGE