

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30881

PRESTON G. DEMOUCHET, JR.,

Petitioner-Appellant

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent-Appellee

Appeal from the United States District Court
for the Western District of Louisiana

ORDER:

Preston G. Demouchet, Jr., Louisiana prisoner # 90331, moves for a certificate of appealability (COA) to appeal the district court's dismissal of his habeas application as an unauthorized successive 28 U.S.C. § 2254 application. When the district court's denial of federal habeas relief is based on procedural grounds, "a COA should issue when the prisoner shows, at least, 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). Because Demouchet has not made the required showing, his COA motion is denied. *See id.*

Following the 1997 dismissal of Demouchet's first § 2254 application and despite the sanctions imposed by the Western District of Louisiana,

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Demouchet has made numerous attempts to collaterally attack his 1976 armed robbery conviction. Demouchet is warned that frivolous, repetitive, or otherwise abusive filings will invite the imposition of sanctions, including dismissal, monetary sanctions, and restrictions on his ability to file pleadings in this court and any other court subject to this court's jurisdiction.

MOTION DENIED; SANCTION WARNING ISSUED.

/s/ James E. Graves, Jr.

JAMES E. GRAVES, JR.
UNITED STATES CIRCUIT JUDGE



A True Copy
Certified order issued Jul 03, 2018

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

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TONY R. MOORE, CLERK
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA, LOUISIANA

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

PRESTON G. DEMOUCHET, JR., CIVIL ACTION NO. 1:17-CV-600-P
Petitioner

VERSUS JUDGE JAMES T. TRIMBLE, JR.

STATE OF LOUISIANA, MAGISTRATE JUDGE PEREZ-MONTES
Respondent

JUDGMENT

For the reasons stated in the Report and Recommendation of the Magistrate Judge previously filed herein (Doc. 10), and after a de novo review of the record including the objection filed by Petitioner (Doc. 11), and having determined that the findings and recommendation are correct under the applicable law;

IT IS ORDERED that the § 2241 petition is DISMISSED without prejudice to filing when/if the appellate court grants authorization. IT IS FURTHER ORDERED that the Rule 60(b) motion (Doc. 3) is hereby DENIED as MOOT.

THUS DONE AND SIGNED at Alexandria, Louisiana, this 28th day of September, 2017.

James T. Trimble, Jr.
JAMES T. TRIMBLE, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

PRESTON G. DEMOUCHET, JR., CIVIL ACTION NO. 1:17-CV-600-P
Petitioner

VERSUS CHIEF JUDGE DRELL

STATE OF LOUISIANA, MAGISTRATE JUDGE PEREZ-MONTES
Respondent

REPORT AND RECOMMENDATION

Before the Court is a pro se petition for writ of habeas corpus (28 U.S.C. § 2241) filed by Petitioner Preston G. Demouchet, Jr. (#90331) ("Demouchet"). Demouchet is an inmate in the custody of the Louisiana Department of Corrections, incarcerated at the Louisiana State Penitentiary in Angola, Louisiana. Demouchet challenges his criminal conviction in the 16th Judicial District Court, St. Mary Parish.

This matter has been referred to the undersigned for review, report, and recommendation in accordance with the provisions of 28 U.S.C. § 636 and the standing orders of the Court.

I. Background

Demouchet has filed numerous habeas petitions in this Court. According to an order in one of Demouchet's prior cases:

In 1976, Preston G. Demouchet, Jr., Louisiana Prisoner # 89,969, was convicted of armed robbery in the Sixteenth Judicial District Court, St. Mary Parish, and sentenced to serve ninety-nine years at hard labor without benefit of parole. His conviction and sentence were affirmed on direct appeal to the Louisiana Supreme Court. State of Louisiana v. Preston Demouchet, 353 So.2d 1025 (La.1977). In the following years, petitioner filed numerous applications for post-conviction relief in the

Louisiana courts, most of which were ultimately denied by the Louisiana Supreme Court as untimely or repetitive.

Petitioner filed several federal habeas corpus petitions in this court attacking that same armed robbery conviction. See Demouchet v. Warden, Louisiana State Penitentiary, 6:97-cv0003; Demouchet v. Warden, Louisiana State Penitentiary, 6:99-cv-1240; Demouchet v. Warden, Louisiana State Penitentiary, 6:00-cv-1782. These petitions were dismissed on the merits because the claims were either procedurally defaulted, untimely, or repetitive.

Petitioner filed yet another petition for habeas corpus on July 31, 2000. Demouchet v. Warden, Louisiana State Penitentiary, 6:01-cv-0931. On July 12, 2001 that petition was dismissed with prejudice as successive; petitioner was sanctioned and ordered to obtain prior judicial approval for all future pro se filings. See Demouchet v. Warden, 6:01-cv-0931, at docs. 4 and 6.

Notwithstanding the sanction order, on October 16, 2006 petitioner submitted yet another pro se habeas corpus petition attacking the validity of his 1976 armed robbery conviction in the Sixteenth Judicial District. Petitioner did not seek judicial approval before filing his petition.

Demouchet v. Cain, No. 6:06-mc-0059, 2006 WL 3065024, at *1 (W.D. La. Oct. 24, 2006). Because Demouchet's § 2241 petition was second or successive, and he had not obtained permission from the Fifth Circuit to file the petition, it was dismissed. Demouchet was also sanctioned \$100.00. Id.

Demouchet filed petitions for writs of mandamus in the Fifth Circuit, which were dismissed. In re: Preston Demouchet, Jr., 14-30998 (5th Cir. 2014); In re: Preston George Demouchet, Jr., 14-30449 (5th Cir. 2014). In one case, Demouchet asked the appellate court to order this Court to produce a federal grand jury indictment allegedly filed against Demouchet in 1976. However, as the Fifth Circuit noted, Demouchet was never tried in federal court; he was convicted of armed robbery in state court in 1976. In re: Preston George Demouchet, Jr., 14-30449 (5th Cir.).

In this latest § 2241 petition, Demouchet claims that the court of conviction was without jurisdiction to convict and sentence him. (Doc. 6, p. 13-15).

II. Law and Analysis

Challenges to a petitioner's state conviction are governed by § 2254, which "confers jurisdiction upon the federal courts to hear collateral attacks on state court judgments." Wadsworth v. Johnson, 235 F.3d 959, 961 (5th Cir. 2000). Section 2254 specifically applies to post-trial situations in which a judgment has already been entered against the petitioner. See Stringer v. Williams, 161 F.3d 259 (5th Cir. 1998).

Demouchet previously filed a § 2254 petition challenging his state conviction. He may not use § 2241 to avoid the prohibition against filing successive petitions under § 2254. As Demouchet has been informed by this Court, before a second or successive § 2254 application is filed in a district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application. Demouchet v. Cain, No. 6:06-MC-0059, 2006 WL 3065024, at *1 (W.D. La. Oct. 24, 2006) (citing 28 U.S.C. § 2244(b)(3)(A)).

A habeas corpus petition is not second or successive simply because it follows an earlier federal petition. In re: Cain, 137 F.3d 234, 235 (5th Cir. 1998). However, the later petition is successive when it: "(1) raises a claim challenging the petitioner's conviction or sentence that was or could have been raised in an earlier petition; or (2) otherwise constitutes an abuse of the writ." Id. The Fifth Circuit has also found that "an application filed after a previous application was fully adjudicated on the merits is a second or successive application within the meaning of 28 U.S.C. § 2244(b), even

if it contains claims never before raised.” Graham v. Johnson, 168 F.3d 762, 774 n. 7 (5th Cir. 1999) (citing Felker v. Turpin, 518 U.S. 651, 655-58, 662-63 (1996)).

The petition before this Court raises a claim that could have been raised in Demouchet’s first habeas corpus petition. Moreover, Demouchet’s first habeas petition was dismissed as procedurally defaulted, which is considered an adjudication on the merits. See Bates v. Whitley, 19 F.3d 1066, 1067 (5th Cir. 1994) (“A federal habeas court’s rejection of a petitioner’s constitutional claim because of state procedural default and a failure to show cause and prejudice must be regarded as a determination on the merits in examining whether a subsequent petition is successive.”); Henderson v. Lampert, 396 F.3d 1049 (9th Cir. 2005) (dismissal of a federal habeas petition on the ground of state procedural default is a determination “on the merits” for the purposes of the successive petition doctrine); Harvey v. Horan, 278 F.3d 370, 380 (4th Cir. 2002) (the district court’s dismissal of petitioner’s original habeas petition for procedural default was a dismissal on the merits); In re: Cook, 215 F.3d 606, 608 (6th Cir. 2000) (initial § 2254 application dismissed for unexcused procedural default was “on the merits,” and subsequent application was a “second or successive habeas corpus application” under § 2254(b)).

III. Conclusion

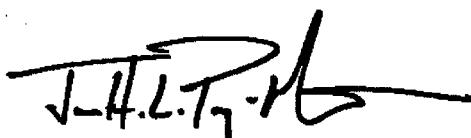
Demouchet’s challenge to his conviction must be raised in a § 2254 petition, over which this Court lacks jurisdiction. Therefore, **IT IS RECOMMENDED** that the petition be **DISMISSED** without prejudice to filing when/if the appellate court grants authorization.

Additionally, because the grounds raised in Demouchet's Rule 60(b) motion (Doc. 3) are the same as those raised in his § 2241 petition, **IT IS RECOMMENDED** that the motion be **DENIED** as **MOOT**.

Under the provisions of 28 U.S.C. § 636(b)(1)(c) and Fed.R.Civ.P. 72(b), parties aggrieved by this Report and Recommendation have fourteen (14) calendar days from service of this Report and Recommendation to file specific, written objections with the Clerk of Court. A party may respond to another party's objections within fourteen (14) days after being served with a copy thereof. No other briefs (such as supplemental objections, reply briefs, etc.) may be filed. Providing a courtesy copy of the objection to the undersigned is neither required nor encouraged. Timely objections will be considered by the District Judge before a final ruling.

Failure to file written objections to the proposed findings, conclusions, and recommendations contained in this Report and Recommendation within fourteen (14) days from the date of its service, or within the time frame authorized by Fed.R.Civ.P. 6(b), shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the District Judge, except upon grounds of plain error.

THUS DONE AND SIGNED in chambers in Alexandria, Louisiana, this
10th day of August, 2017.



Joseph H.L. Perez-Montes
United States Magistrate Judge