

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-10837
c/w No. 18-10888

In re: EMANUAL DELEON FIELDS,

Movant

consolidated with 18-10888

EMANUAL DELEON FIELDS,

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

ON PETITION FOR REHEARING EN BANC

(Opinion 11/05/2018, 5 Cir., _____, _____ F.3d _____)

Before SMITH, HIGGINSON, and DUNCAN, Circuit Judges.

PER CURIAM:

- (✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.
- () Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:


STEPHEN A. HIGGINSON
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-10837
c/w No. 18-10888
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

November 5, 2018

Lyle W. Cayce
Clerk

In re: EMANUAL DELEON FIELDS,

Movant

cons/w 18-10888

EMANUAL DELEON FIELDS,

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
USDC No. 3:18-CV-357

Before SMITH, HIGGINSON, and DUNCAN, Circuit Judges.

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Emanuel Deleon Fields, Texas prisoner # 01127671, was convicted of three aggravated robberies and sentenced to 60 years imprisonment. After his convictions were affirmed on direct appeal, Fields filed a 28 U.S.C. § 2254 petition asserting a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986). The district court denied his petition for habeas corpus, and this court affirmed. *Fields v. Thaler*, 588 F.3d 270 (5th Cir. 2009). Fields subsequently filed successive § 2254 applications asserting actual innocence. This court denied Fields authorization to file his successive petitions.

Fields now seeks to renew the claim raised in his initial § 2254 application that the prosecution used peremptory strikes in a racially discriminatory manner. Fields filed a motion in district court invoking Federal Rule of Civil Procedure 60(b)(6). The district court construed Fields's motion as an unauthorized successive § 2254 application and transferred the matter to this court. Fields now appeals the district court's transfer order and moves for authorization to file a successive § 2254 application.

Fields previously raised his *Batson* claim in his initial § 2254 application, and the claim is based on facts known at trial. Therefore, the district court properly determined that the motion was an unauthorized successive § 2254 application. *See Leal Garcia v. Quarterman*, 573 F.3d 214, 222 (5th Cir. 2009); 28 U.S.C. § 2244(b)(1). Because the district court properly concluded that Fields's motion constituted a successive § 2254 application, it did not err in transferring the motion to this court. *See* § 2244(b)(3)(A); *United States v. Fulton*, 780 F.3d 683, 686 (5th Cir. 2015).

To obtain authorization to file a successive § 2254 application, an applicant must demonstrate that the claim relies on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or that "the factual predicate

for the claim could not have been discovered previously through the exercise of due diligence” and that the facts, “if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.” 28 U.S.C. § 2244(b)(2).

Fields has not shown that his claim relies on a new factual predicate or on a new rule of constitutional law made retroactively applicable by the Supreme Court to his case on collateral review. *See* § 2244(b)(2). Fields’s argument that this court’s grant of a certificate of appealability in *Rhoades v. Davis*, 852 F.3d 422 (5th Cir. 2017), supports his *Batson* claim is not a permissible basis to authorize a successive petition. To the extent that Fields raises the identical claim that he raised in his initial § 2254 application, that claim is not considered. *See* § 2244(b)(1).

Accordingly, the transfer order of the district court is **AFFIRMED**. Fields’s motion for leave to proceed in forma pauperis on appeal is **DENIED**. The motion for authorization to file a successive § 2254 application is **DENIED**. Fields is **WARNED** that future frivolous or repetitive challenges to his conviction and sentence in this court or any court subject to this court’s jurisdiction will result in the imposition of sanctions.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EMANNUAL DELEON FIELDS	§	
Petitioner,	§	
	§	No. 3:18-cv-357-K
LORIE DAVIS, <i>Director</i>	§	
TDCJ,	§	
Respondent.	§	

JUDGMENT

The Court has entered its Order Accepting the Findings, Conclusions, and Recommendation of the United States Magistrate Judge in this case. It is therefore ORDERED, ADJUDGED AND DECREED that Petitioner's Fed. R. Civ. P. 60(b) motion is construed as a successive habeas petition under 28 U.S.C. § 2254 and is TRANSFERRED to the United States Court of Appeals for the Fifth Circuit and all pending motions are DENIED. See 28 U.S.C. § 2244(b)(3); 28 U.S.C. § 1631.

SO ORDERED.

Signed June 28th, 2018.


ED KINKEADE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EMANNUAL DELEON FIELDS	§	
Petitioner,	§	
	§	No. 3:18-cv-357-K
LORIE DAVIS, <i>Director</i>	§	
TDCJ,	§	
Respondent.	§	

ORDER ACCEPTING FINDINGS AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

The United States Magistrate Judge made Findings, Conclusions, and a Recommendation in this case. Petitioner filed objections, and the District Court has made a *de novo* review of those portions of the proposed findings and recommendation to which objection was made. The objections are overruled, and the Court **ACCEPTS** the Findings, Conclusions, and Recommendation of the United States Magistrate Judge.

SO ORDERED.

Signed June 28th, 2018.


ED KINKEADE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EMANUAL DELEON FIELDS	§	
Petitioner,	§	
	§	
v.	§	Case No. 3:18-cv-357-K (BT)
	§	
LORIE DAVIS, <i>Director</i> TDCJ,	§	
Respondent.	§	

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

This cause of action was referred to the United States Magistrate Judge pursuant to the provisions of Title 28, United States Code, § 636(b), as implemented by an order of the United States District Court for the Northern District of Texas. The Findings, Conclusions, and Recommendation of the United States Magistrate Judge follow:

I.

Petitioner is a prisoner in the Texas Department of Criminal Justice, Correctional Institutions Division. He filed a motion for relief from judgment under Fed. R. Civ. P. 60(b)(6). For the following reasons, the motion should be construed as a petition under 28 U.S.C. § 2254 and transferred to the Fifth Circuit Court of Appeals as successive.

Petitioner was convicted of three aggravated robberies and sentenced to 60 years confinement. His convictions and sentences were affirmed on direct appeal. *Fields v. State*, Nos. 05-02-01665-CR, 05-02-01666-CR & 05-02-01667-CR,

2004 WL 60765 (Tex. App.--Dallas, Jan. 14, 2004, pet. ref'd). Petitioner also filed separate applications for state post-conviction relief with respect to each conviction. The applications were denied without written order. *Ex parte Fields*, Nos. 61,187-02, 61,187-03 & 61,187-04 (Tex. Crim. App. Jan. 11, 2006).

On February 7, 2006, Petitioner filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. *Fields v. Quarterman*, 3:06-cv-236-N (N.D. Tex.). On May 16, 2007, the district court denied the petition on the merits. Petitioner later filed two other § 2254 petitions that were transferred to the Fifth Circuit Court of Appeals as successive. *See Fields v. Quarterman*, No. 3:13-cv-3418-N (N.D. Tex. May 7, 2015); *Fields v. Davis*, No. 17-cv-3316-G (N.D. Tex. Jan. 2, 2018).

On February 5, 2018, Petitioner filed the instant Rule 60(b) motion. By his motion, Petitioner argues that his convictions are unlawful because the prosecutor violated *Batson v. Kentucky*, 476 U.S. 79 (1986).

II.

Although Petitioner filed this petition as a motion for relief from judgment under Fed. R. Civ. P. 60(b), his motion challenges his convictions and is properly construed as a second or successive petition under 28 U.S.C. § 2244(b). *See Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005) (stating a Rule 60(b) motion that challenges a petitioner's conviction or sentence, rather than defects in the federal habeas corpus proceeding, is treated as a habeas corpus petition).

The Antiterrorism and Effective Death Penalty Act of 1996 limits the circumstances under which a federal prisoner may file a second or successive

motion for post-conviction relief. ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT, Publ. L. 104-132, 110 Stat. 1214 (1996). A defendant must show that the successive motion is based on: (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found him guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court. *See* 28 U.S.C. § 2244(b)(2). Before Petitioner files his application in this Court, a three-judge panel of the Fifth Circuit must determine whether the application makes the requisite prima facie showing. *See* 28 U.S.C. § 2244(b)(3)(A) and (B).

The Fifth Circuit has not issued an order authorizing this Court to consider the successive motion. Petitioner must obtain such an order before filing another petition for habeas relief under § 2254.

III.

Petitioner's Rule 60(b) motion should be construed as a petition for writ of habeas corpus under 28 U.S.C. § 2254, and the petition should be TRANSFERRED to the United States Court of Appeals for the Fifth Circuit pursuant to *In re Epps*, 127 F.3d 364, 365 (5th Cir. 1997).

Signed June 12, 2018.


REBECCA RUTHERFORD
UNITED STATES MAGISTRATE JUDGE

**INSTRUCTIONS FOR SERVICE AND
NOTICE OF RIGHT TO APPEAL/OBJECT**

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 these 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); Fed. R. Civ. P. 72(b). 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 Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).