

United States Court of Appeals for the Fifth Circuit

No. 23-30687
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
December 21, 2023

CHARLES K. WALLACE,

Lyle W. Cayce
Clerk

Petitioner—Appellant,

versus

LOUISIANA STATE,

Respondent—Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:23-CV-5242

Before JONES, SOUTHWICK, and HO, *Circuit Judges.*

PER CURIAM:

Charles K. Wallace, Louisiana prisoner # 093248, appeals the district court's order construing his 28 U.S.C. § 2241 petition as an unauthorized successive 28 U.S.C. § 2254 application and transferring it to this court. He additionally moves for the appointment of counsel.

* This opinion is not designated for publication. See 5TH CIR. R. 47.5.

Wallace first argues that the district court improperly construed his § 2241 petition as a § 2254 application. Given that Wallace's § 2241 petition challenged the validity of his second degree murder conviction, the district court properly construed the petition as filed pursuant to § 2254. *See Hartfield v. Osborne*, 808 F.3d 1066, 1071-73 (5th Cir. 2015).

Our review of Wallace's remaining arguments likewise show no error. Given that Wallace's constructive § 2254 application challenged the validity of the same second degree murder conviction that he challenged in his prior § 2254 application, the district court correctly determined that the application was successive. *See Leal Garcia v. Quarterman*, 573 F.3d 214, 220-21 (5th Cir. 2009).

Accordingly, the district court's transfer order is AFFIRMED. Wallace's motion for the appointment of counsel is DENIED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CHARLES K. WALLACE, #93248

CIVIL ACTION

VERSUS

NO. 23-5242

STATE OF LOUISIANA

SECTION: "f"(1)

ORDER

Petitioner, Charles K. Wallace, has filed a petition for writ of habeas corpus. Although he indicated on his application that he was seeking relief pursuant to 28 U.S.C. § 2241, his petition challenges the validity his 1991 state conviction for second degree murder. Therefore, the Court hereby construes the petition as one seeking relief pursuant to 28 U.S.C. § 2254.¹

However, a review of this Court's records reflects that petitioner filed a prior petition for writ of habeas corpus related to that same state criminal judgment which was dismissed with prejudice. Wallace v. Louisiana, Civ. Action No. 94-0427 (E.D. La. Apr. 6, 1994). The United States Fifth Circuit Court of Appeals thereafter dismissed the related appeal. Wallace v. Ieyoub, No. 95-30013, 1995 WL 581549 (5th Cir. Aug. 24, 1995). The United States Supreme Court then denied his petition for a writ of certiorari. Wallace v. Ieyoub, 516 U.S. 1178 (1996).

In 2007, petitioner filed another federal habeas corpus application challenging that same state criminal judgment. Because that application was a second or successive petition, the Court

¹ Both § 2241 and § 2254 can serve as a basis for relief for convicted state prisoners. That said, the two sections are not interchangeable; rather, each applies in a specific situation. Specifically, § 2254 applies when a prisoner is challenging the legality of either his underlying state conviction or sentence, whereas § 2241 applies when a prisoner is instead challenging the manner in which prison officials are executing his sentence. See Stewart v. Cain, No. 95-30865, 1995 WL 727244 (5th Cir. Nov. 21, 1995); Stewart v. Vannoy, No. 17-1923, 2018 WL 1916845, at *5 n.8 (E.D. La. Feb. 28, 2018), adopted, 2018 WL 1912147 (E.D. La. Apr. 23, 2018); Williams v. Cain, Civ. Action No. 14-1517, 2015 WL 4647947, at *2 (E.D. La. July 27, 2015).

construed it in part as a motion for authorization for the District Court to consider the second or successive claims raised therein and transferred it to the United States Fifth Circuit Court of Appeals for that Court to determine whether petitioner was authorized under 28 U.S.C. § 2244(b) to file the application. Wallace v. Blanco, No. 07-1503 (E.D. La. June 13, 2007). The Court of Appeals denied authorization for the filing. In re Wallace, No. 07-30563 (5th Cir. Oct. 2, 2007).

In 2012, petitioner filed another federal habeas corpus application challenging that same state criminal judgment. Because that application was also a second or successive petition, the Court likewise construed it in part as a motion for authorization for the District Court to consider the second or successive claims raised therein and transferred it to the United States Fifth Circuit Court of Appeals. Wallace v. Goodwin, No. 12-2314 (E.D. La. Oct. 10, 2012). The Court of Appeals again denied authorization for the filing. In re Wallace, No. 12-31040 (5th Cir. Apr. 9, 2013).

In 2019, petitioner filed yet another federal habeas corpus application challenging that same state criminal judgment. Because that application was also a second or successive petition, the Court likewise construed it in part as a motion for authorization for the District Court to consider the second or successive claims raised therein and transferred it to the United States Fifth Circuit Court of Appeals. Wallace v. Goodwin, No. 19-9720 (E.D. La. May 14, 2019). The Court of Appeals again denied authorization for the filing and issued petitioner the following warning:

This is Wallace's third unsuccessful motion for authorization to file a successive § 2254 application. He 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 court subject to this court's jurisdiction.

In re Wallace, No. 19-30385 (5th Cir. June 6, 2019).

Undeterred, petitioner has now filed the instant petition, which is likewise a second or successive petition as described in 28 U.S.C. § 2244. Accordingly, in order to overcome the prohibition against the filing of a second or successive claim under that section, petitioner must establish one of the following exceptions:

- 1) the claim relies on a new rule of law, made retroactive to cases on collateral review by the United States Supreme Court, that was previously unavailable; or
- 2) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence, and
(ii) the facts underlying the claim, 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 the constitutional error, no reasonable factfinder would have found the petitioner guilty of the underlying offense.

28 U.S.C. § 2244(b)(2)(A),(B).

Before the petition can be considered on the merits by this District Court, petitioner must obtain authorization to file this second or successive petition from the United States Fifth Circuit Court of Appeals by making a *prima facie* showing of the above listed requirements to that appellate court as required by 28 U.S.C. § 2244(b)(3)(A). Until such time as he obtains said authorization, this Court is without jurisdiction to proceed.

Accordingly,

IT IS ORDERED that Charles K. Wallace's petition be construed in part as a motion for authorization for the District Court to consider the second or successive claims raised therein.

IT IS FURTHER ORDERED that the petition be and hereby is **TRANSFERRED** to the United States Fifth Circuit Court of Appeals under the authority of 28 U.S.C. § 1631 for that Court

to determine whether petitioner is authorized under 28 U.S.C. § 2244(b) to file the instant habeas corpus petition in this District Court.²

New Orleans, Louisiana, September 14, 2023.



LANCE M. AFRICK
UNITED STATES DISTRICT JUDGE

² Where, as here, a pleading filed as a § 2241 petition is in fact a successive § 2254 petition, it is proper for the district court to construe it as such and transfer it to the Court of Appeals. See, e.g., Watts v. Tanner, 697 F. App'x 267 (5th Cir. 2017); Harrison v. Cain, Civ. Action No. 07-5452, 2007 WL 3120649 (E.D. La. Oct. 22, 2007).

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USDC No. 2:23-CV-5242

ON PETITION FOR REHEARING EN BANC

Before JONES, SOUTHWICK, and Ho, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

**Additional material
from this filing is
available in the
Clerk's Office.**