Appendix A1

United States Court of Appeals for the Fifth Circuit

No. 24-10430

United States Court of Appeals
Fifth Circuit
FILED
August 13, 2024
Lyle W. Cayce
Clerk

HERBERT LAVONNE WIGGINS,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Application for Certificate of Appealability
the United States District Court
for the Northern District of Texas
USDC No. 3:23-CV-2598

ORDER:

Herbert Lavonne Wiggins, Texas prisoner # 1370636, was convicted of aggravated sexual assault of a child and sentenced to life imprisonment. He moves for a certificate of appealability (COA) to appeal the district court's dismissal of his Federal Rule of Civil Procedure 60(b) motion as an unauthorized successive 28 U.S.C. § 2254 application challenging his conviction.

Wiggins contends that his Rule 60(b) motion is not successive because he has newly available evidence that demonstrates that his counsel labored

under a conflict of interest and the prosecutor engaged in misconduct. He additionally argues that his motion was not successive because his initial § 2254 application was denied, in part, because two of the claims he raised therein were unexhausted and procedurally barred. Finally, he reprises the substantive claims that he raised in his Rule 60(b) motion, including an actual innocence claim.

To obtain a COA, Wiggins must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). When, as in this case, the district court denies relief on procedural grounds, a COA should issue if the movant 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). Wiggins has not made the required showing. Accordingly, his motion for a COA is DENIED.

/s/James E. Graves, Jr.

JAMES E. GRAVES, JR.
United States Circuit Judge

Appendix-A-2

United States Court of Appeals for the Fifth Circuit

No. 24-10430

United States Court of Appeals
Fifth Circuit
FILED
September 6, 2024
Lyle W. Cayce
Clerk

HERBERT LAVONNE WIGGINS,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *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. 3:23-CV-2598

UNPUBLISHED ORDER

Before SMITH, GRAVES, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:

A member of this panel previously DENIED Appellant's motion for a certificate of appealability. The panel has considered Appellant's motion for reconsideration.

IT IS ORDERED that the motion is DENIED.

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

HERBERT LAVONNE WIGGINS, TDCJ No. 1370636, Petitioner, V. DIRECTOR, TDCJ-CID, Respondent.	§ § § § § § § § § §	No. 3:23-cv-2598-D-BN

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

Petitioner Herbert Lavonne Wiggins

> was charged by indictment with sexually assaulting his six-year-old granddaughter by penetrating her sexual organ with his finger. A jury convicted petitioner of aggravated sexual assault and sentenced him to life imprisonment. His conviction and sentence were affirmed on direct appeal. [Wiggins] also filed an application for state post-conviction relief. The application was denied without written order on the findings of the trial court. [Wiggins] then filed [his first 28 U.S.C. § 2254 habeas application] in federal district court.

Wiggins v. Thaler, No. 3:10-cv-61-P, 2010 WL 5093943, at *1 (N.D. Tex. Oct. 19, 2010) (cleaned up), *rec. accepted*, 2010 WL 5093942 (N.D. Tex. Dec. 14, 2010); *see generally id.* (denying initial application); *see also Wiggins v. Lumpkin*, No. 23-10060, 2023 WL 3674350 (5th Cir. Mar. 3, 2023) (per curiam) (documenting Wiggins's subsequent attempts to obtain relief under Section 2254).

Wiggins now returns to federal district court to again attack his state conviction but under Federal Rule of Civil Procedure 60(b). *See* Dkt. No. 3.

Senior United States District Judge Sidney A. Fitzwater referred Wiggins's

filing to the undersigned United States magistrate judge for pretrial management under 28 U.S.C. § 636(b) and a standing order of reference.

The Court must first consider whether Wiggins's filing is an actual Rule 60(b) motion or a habeas petition in disguise.

"[T]here are two circumstances in which a district court may properly consider a Rule 60(b) motion in a § 2254 proceeding: (1) the motion attacks a 'defect in the integrity of the federal habeas proceeding,' or (2) the motion attacks a procedural ruling which precluded a merits determination" by, for example, arguing that a district court's ruling as to exhaustion, procedural default, or limitations was in error. *Gilkers v. Vannoy*, 904 F.3d 336, 344 (5th Cir. 2018) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005)); *see also Jackson v. Lumpkin*, 25 F.4th 339, 340-41 (5th Cir. 2022).

Wiggins's filing does neither. Through it, he instead raises claims attacking the integrity of the state criminal proceeding, mainly the effectiveness of his counsel. And, where Wiggins's filing does not attack a procedural ruling in federal court but instead contends that he is actually innocent based on newly-discovered evidence, asserting claims already considered, and where his initial Section 2254 application presented "four grounds for relief, [ ] contend[ing] that he received ineffective assistance of counsel," *Wiggins*, 2010 WL 5093943, at *1, the Court should construe Wiggins's current filing as a successive Section 2254 petition, *see Banister v. Davis*, 590 U.S. ____, 140 S. Ct. 1698, 1709 (2020) ("[A] Rule 60(b) motion for relief from a final judgment denying habeas relief counts as a second or successive habeas

application ... so long as the motion 'attacks the federal court's previous resolution of a claim on the merits.'" (cleaned up)).

And, as Wiggins previously exercised his one opportunity to seek relief under Section 2254 as to this state conviction, the undersigned enters these findings of fact, conclusions of law, and recommendation that, because Wiggins's current construed Section 2254 petition is unauthorized as successive, the Court should dismiss the application without prejudice under the circumstances here.

"A state prisoner is entitled to one fair opportunity to seek federal habeas relief from his conviction. But he may not usually make a 'second or successive habeas corpus application.'" *Banister*, 140 S. Ct. at 1702 (quoting 28 U.S.C. § 2244(b)). As such, Section 2244

> lays out the requirements for filing successive petitions, serving as gate-keeper by preventing the repeated filing of habeas petitions that attack the prisoner's underlying conviction. The statute does not define "second or successive," however, and we have made clear that a petition is not "second or successive" merely because it is numerically second.
> ...
> Later habeas petitions attacking the same judgment that was attacked in a prior petition tend to be labeled successive and must meet the standards for authorization under § 2244. In contrast, later habeas petitions attacking distinct judgments, administration of an inmate's sentence, a defective habeas proceeding itself, or some other species of legal error – when the error arises after the underlying conviction – tend to be deemed non-successive. In essence, if the purported defect existed, or the claim was ripe, at the time of the prior petition, the later petition is likely to be held successive even if the legal basis for the attack was not. If, however, the purported defect did not arise, or the claim did not ripen, until after the conclusion of the previous petition, the later petition based on that defect may be non-successive.

Leal Garcia v. Quarterman, 573 F.3d 214, 220, 222 (5th Cir. 2009) (footnotes omitted).

Wiggins previously exercised his "one fair opportunity to seek federal habeas

relief from his conviction," *Banister*, 140 S. Ct. at 1702, and his current claims allege defects in the state conviction that "existed ... at the time of the [first federal] petition ... even if the legal basis for the [current] attack was not" known to Wiggins when he filed an initial Section 2254 application, *Leal Garcia*, 573 F.3d at 222. *Accord In re Will*, 970 F.3d 536, 540 (5th Cir. 2020) (per curiam).

Wiggins therefore presents claims that are successive.

And his failure to first obtain authorization from the court of appeals under 28 U.S.C. § 2244(b)(3) deprives the district court of jurisdiction to consider the habeas application. *See Leal Garcia*, 573 F.3d at 219 ("AEDPA requires a prisoner to obtain authorization from the federal appellate court in his circuit before he may file a 'second or successive' petition for relief in federal district court. Without such authorization, the otherwise-cognizant district court has no jurisdiction to entertain a successive § 2254 petition." (footnotes omitted)).

The Court could cure this want of jurisdiction by transferring this application to the Fifth Circuit for appropriate action. *See* 28 U.S.C. § 1631. But, considering Wiggins's established record of successive petitions as to his conviction, "a dismissal without prejudice appears more efficient and better serves the interests of justice than a transfer in this instance." *United States v. King*, Nos. 3:97-cr-0083-D-01 & 3:03-cv-1524-D, 2003 WL 21663712, at *1 (N.D. Tex. July 11, 2003).

Recommendation

The Court should dismiss the construed application for writ of habeas corpus under 28 U.S.C. § 2254 without prejudice for lack of jurisdiction.

A copy of these 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 Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: November 29, 2023

DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE

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

HERBERT LAVONNE WIGGINS, TDCJ No. 1370636, Petitioner, V. DIRECTOR, TDCJ-CID, Respondent.	§ § § § § § § § § §	No. 3:23-cv-2598-D-BN

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

Petitioner Herbert Lavonne Wiggins was convicted of aggravated sexual assault and sentenced to life imprisonment, and, after his state conviction became final, he unsuccessfully challenged it in federal court under 28 U.S.C. § 2254. *See Wiggins v. Thaler*, No. 3:10-cv-61-P, 2010 WL 5093943 (N.D. Tex. Oct. 19, 2010), *rec. accepted*, 2010 WL 5093942 (N.D. Tex. Dec. 14, 2010).

Since this initial denial, Wiggins has made numerous attempts to obtain relief under Section 2254. *See, e.g.*, *Wiggins v. Lumpkin*, No. 23-10060, 2023 WL 3674350 (5th Cir. Mar. 3, 2023) (per curiam).

Recently, he returned to federal district court to attack his state conviction under Federal Rule of Civil Procedure 60(b). *See* Dkt. No. 3.

Senior United States District Judge Sidney A. Fitzwater referred Wiggins's filing to the undersigned United States magistrate judge for pretrial management under 28 U.S.C. § 636(b) and a standing order of reference.

And the undersigned has entered findings of fact and conclusions of law

recommending that the Court construe the Rule 60(b) motion as a Section 2254 application and, after doing so, because Wiggins's filing is an unauthorized successive petition, dismiss the application for lack of jurisdiction [Dkt. No. 6] (the "FCR").

Wiggins filed objections to the FCR. *See* Dkt. No. 7.

And Judge Fitzwater re-referred this matter to the undersigned "to address petitioner's objections and, if appropriate, enter an amended recommended disposition." Dkt. No. 8.

Discussion

As set out in the FCR, "there are two circumstances in which a district court may properly consider a Rule 60(b) motion in a § 2254 proceeding: (1) the motion attacks a 'defect in the integrity of the federal habeas proceeding,' or (2) the motion attacks a procedural ruling which precluded a merits determination" by, for example, arguing that a district court's ruling as to exhaustion, procedural default, or limitations was in error. *Gilkers v. Vannoy*, 904 F.3d 336, 344 (5th Cir. 2018) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005)); *see also Jackson v. Lumpkin*, 25 F.4th 339, 340-41 (5th Cir. 2022).

Through his objections, Wiggins does not urge the Court to reject the undersigned's finding that Wiggins's filing does neither.

But he does reassert that the current attack on his state conviction, the basis for which he claims he first discovered in 2021, should not be considered successive because that attack has yet to be considered on its merits:

> So petitioner was not asserting claims already considered, how could they when they were not discovered until 2021. And petitioner claim

> them and the claims have not been adjudicated on the merits by any court. So therefore, the rule of procedure 60(b) states that any evidence which Wiggins claims for the first time should be construed as a 60(b) motion not a habeas proceedings.

Dkt. No. 7 at 2-3.

The claimed newly discovered evidence as set out in the habeas application is that Wiggins first learned in 2021 that his defense counsel labored under a conflict of interest. *See, e.g.*, Dkt. No. 3 at 2 ("Because petitioner counsel traded him to prosecutor for another client. All of the official in Ellis county courts were fired and indicted for extortion, money laundering, racketeering and embezzlement, just to name a few charges that was brought against them.").

While Wiggins provides no evidence to support these assertions, even if the Court were to accept them as true for present purposes, the basis for this collateral attack – the claimed conflict of interest – existed (and the associated claims were ripe) when Wiggins filed his initial Section 2254 petition, as Wiggins fails to indicate an ensuing event exists that could serve as the basis for these claims, such as a subsequent court order or judgment concerning the claimed conflict.

So the present claims, allegedly not discovered until 2021, are successive even though Wiggins asserts that he was unaware they existed when he filed his first federal habeas petition. *See Leal Garcia v. Quarterman*, 573 F.3d 214, 222 (5th Cir. 2009) ("In essence, if the purported defect existed, or the claim was ripe, at the time of the prior petition, the later petition is likely to be held successive even if the legal basis for the attack was not. If, however, the purported defect did not arise, or the claim did not ripen, until after the conclusion of the previous petition, the later

petition based on that defect may be non-successive.").

A stark example of this principle is where a later petition presents a claim that exculpatory evidence was withheld in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). By its nature, such a claim may not have been discoverable when an initial petition was filed. But it nevertheless existed. "Thus, a petitioner asserting a newly discovered *Brady* claim in a successive habeas case must pass the tests of [28 U.S.C. §] 2244(b)(2) before a federal court may reach the merits." *Blackman v. Davis*, 909 F.3d 772, 778 n.2 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1215 (2019).

As the district court explained in transferring Blackman's habeas application presenting *Brady* claims for the first time to the United States Court of Appeals for the Fifth Circuit, because the district court lacked jurisdiction,

> [i]t could be argued that Petitioner could not have raised the claims related to suppressed evidence when she filed her earlier federal petitions in 2002 and 2004 since she did not know she had such claims – because, until 2008, the Dallas County District Attorney's Office did not have an open file policy as to habeas writs.
>
> But, even if the Court accepted this argument, this petition is nevertheless successive because the claims therein are "based on facts that were merely undiscoverable." *Stewart v. United States*, 646 F.3d 856, 863 (11th Cir. 2011) (applying *Leal Garcia* to find that, there, the numerically second federal habeas petition fell "within what the Fifth Circuit recognized is a small subset of unavailable claims that must not be categorized as successive.... [There,] the facts indicating there might be flaws in Stewart's Georgia convictions existed in 2004[, when he filed his first federal habeas petition,] but the *basis* for [the claim presented in numerically second federal habeas petition] – [an] order vacating [certain] predicate convictions – did not exist until July 2, 2008." (emphasis in original)); *see Crawford v. Minnesota*, 698 F.3d 1086, 1089, 1091 (8th Cir. 2012) (affirming the district court's conclusion that because petitioner's second application was successive, "preauthorization is required for *Brady* claims" and noting the district court "did not want to 'encourage misbehavior' by prosecutors or other state actors[, but i]n the end it concluded that AEDPA's

> preauthorization procedures provide Crawford with federal review of his claim"). Here, under *Leal Garcia*, Petitioner's claims raised in her third federal habeas application attack purported defects that existed or claims that were ripe at the time of the prior applications even though Petitioner claims that the evidence to support and identify those claims was not previously discovered or discoverable. *See Leal Garcia*, 573 F.3d at 221-22.

Blackman v. Stephens, No. 3:13-cv-2073-P-BN, 2015 WL 694953, at *6 (N.D. Tex. Feb. 18, 2015) (citations omitted); *see also In re Will*, 970 F.3d 536, 540 (5th Cir. 2020) (per curiam) ("[E]ven though Will did not know of the State's alleged *Brady* violation at the time he filed his first habeas petition, it is still subject to AEDPA's statutory requirements for filing a successive petition." (citation omitted)).

For these reasons, the Court should overrule Wiggins's objections. And, for the reasons set out in the FCR as supplemented above, the Court should dismiss the construed successive habeas application for lack of jurisdiction.

Recommendation

The Court should overrule Petitioner Herbert Lavonne Wiggins's objections [Dkt. No. 7] to the November 29, 2023 findings of fact, conclusions, and recommendation [Dkt. No. 6] and dismiss the construed application for writ of habeas corpus under 28 U.S.C. § 2254 [Dkt. No. 3] without prejudice for lack of jurisdiction.

A copy of these 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 Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: December 29, 2023

DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE

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

HERBERT LAVONNE WIGGINS, TDCJ No. 1370636, Petitioner, V. DIRECTOR, TDCJ-CID, Respondent.	§ § § § § § § § § §	No. 3:23-CV-2598-D

ORDER

The United States Magistrate Judge made findings, conclusions, and a recommendation (as supplemented) in this case. Petitioner filed objections on February 8, 2024 (styled as a Rule 59(e) motion) and a Rule 59(e) and Rule 60(b) motion on March 5, 2024. The undersigned district judge reviewed *de novo* those portions of the proposed findings, conclusions, and recommendation (as supplemented) to which objection was made, and reviewed the remaining proposed findings, conclusions, and recommendation for plain error. Finding no error, the court adopts the findings, conclusions, and recommendation (as supplemented) of the United States Magistrate Judge.

The court denies petitioner's motions filed on February 8, 2024 and March 5, 2024.

Considering the record in this case and pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing §§ 2254 and 2255 proceedings,

and 28 U.S.C. § 2253(c), the court denies a certificate of appealability. The court adopts and incorporates by reference the magistrate judge's findings, conclusions, and recommendation (as supplemented) filed in this case in support of its finding that petitioner has failed to show that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" or "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000).

But if petitioner files a notice of appeal, he must either pay the applicable appellate filing fee or move for leave to appeal *in forma pauperis*.

SO ORDERED.

March 26, 2024.

SIDNEY A. FITZWATER
SENIOR JUDGE