

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION**

JOHNNY RAY HAWTHONE
ADC #110572

PETITIONER

VS.

5:09CV00193 BSM/JTR

STATE OF ARKANSAS;
LARRY NORRIS, Director
Arkansas Department of Correction

RESPONDENTS

PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

INSTRUCTIONS

The following recommended disposition has been sent to United States District Judge Brian S. Miller. Any party may serve and file written objections to this recommendation. Objections should be specific and should include the factual or legal basis for the objection. If the objection is to a factual finding, specifically identify that finding and the evidence that supports your objection. An original and one copy of your objections must be received in the office of the United States District Clerk no later than eleven (11) days from the date of the findings and recommendations. The copy will be furnished to the opposing party. Failure to file timely objections may result in waiver of the right to appeal questions of fact.

If you are objecting to the recommendation and also desire to submit new, different, or additional evidence, and to have a hearing for this purpose before the United States District Judge, you must, at the same time that you file your written objections, include a "Statement of Necessity" that sets forth the following:

1. Why the record made before the Magistrate Judge is inadequate.
2. Why the evidence to be proffered at the requested hearing before the United States District Judge was not offered at the hearing before the Magistrate Judge.
3. An offer of proof setting forth the details of any testimony or other evidence (including copies of any documents) desired to be introduced at the requested hearing before the United States District Judge.

From this submission, the United States District Judge will determine the necessity for an additional evidentiary hearing, either before the Magistrate Judge or before the District Judge.

Mail your objections and “Statement of Necessity” to:

Clerk, United States District Court
Eastern District of Arkansas
600 West Capitol Avenue, Suite 402
Little Rock, AR 72201-3325

I. Introduction

Petitioner, Johnny Ray Hawthone, has filed a Petition for a Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, and a Motion to Proceed In Forma Pauperis. (Docket entries #1 and #2.) Petitioner challenges his January 14, 1997 conviction in Miller County Circuit Court of attempted rape and possession of drug paraphernalia. The pending Petition is the latest in a long line of habeas actions Petitioner has filed, in both the Eastern and Western Districts of Arkansas, attacking the same conviction.

On May 14, 2001, Petitioner filed his first federal habeas action attacking his conviction in the Western District of Arkansas, *Hawthone v. Norris*, W.D. Ark. No. 4:01CV04074 HFB. United States District Judge Harry F. Barnes dismissed the Petition as untimely, and the Eighth Circuit

Court of Appeals affirmed. *Id.* at docket entries #30 and #43. Petitioner followed his original federal habeas case with four successive habeas actions that were filed without authorization from the Eighth Circuit Court of Appeals: (1) *Hawthone v. Norris*, E.D. Ark. No. 5:03CV560 GH (dismissed as unauthorized successive petition); (2) *Hawthone v. Norris*; W.D. Ark. 4:06CV04098 HFB (dismissed as unauthorized successive petition); (3) *Hawthone v. Norris*, W.D. Ark. No. 4:07CV04074 HFB (dismissed as unauthorized successive petition); and (4) *Hawthone v. Norris*, W.D. Ark. No. 4:09CV04028 HFB (dismissed as unauthorized successive petition).

Petitioner filed the current habeas action on July 9, 2009. For the reasons set forth below, the Court recommends that the Motion to Proceed *In Forma Pauperis* be denied, as moot, and that the habeas Petition be dismissed, without prejudice, so that Petitioner may seek permission from the Eighth Circuit to file a successive habeas petition.

II. Discussion

A claim presented in a second or successive habeas petition under § 2254 must be dismissed unless the Petitioner can make a prima facie showing that he meets all of the requirements of 28 U.S.C. § 2244(b)(2). However, this determination must be made by the Eighth Circuit Court of Appeals, not the United States District Court. *See* 28 U.S.C. § 2244(b)(3)(A) (“Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate *court of appeals* for an order authorizing the district court to consider the application”). Thus, in order to file a successive habeas action in this Court, Petitioner must obtain authorization from the Eighth Circuit, pursuant to 28 U.S.C. § 2244(b)(3)(A). *See Pennington v. Norris*, 257 F.3d 857, 858 (8th Cir. 2001) (explaining that a habeas petitioner must obtain authorization from the Eighth Circuit before he can raise a successive challenge to a state

conviction).

III. Conclusion

IT IS THEREFORE RECOMMENDED THAT:

1. Petitioner's Motion to Proceed *In Forma Pauperis* (docket entry #1) be DENIED, AS MOOT.

2. The Petition for a Writ of Habeas Corpus, under 28 U.S.C. § 2254 (docket entry #2), be DISMISSED, WITHOUT PREJUDICE, so that Petitioner may seek authorization from the Eighth Circuit, pursuant to 28 U.S.C. § 2244(b)(3)(A), to file a successive habeas petition.

Dated this 10th day of August, 2009.


UNITED STATES MAGISTRATE JUDGE