

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

DEVONTAE MARQUEZ RIVERS  
ADC # 153025

PETITIONER

V.

CASE NO. 5:18-CV-00287-SWW-JTK

WENDY KELLEY, Director  
Arkansas Department of Correction

RESPONDENT

**PROPOSED FINDINGS AND RECOMMENDATIONS**

**INSTRUCTIONS**

The following recommended disposition has been sent to United States District Court Judge Susan Webber Wright. 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 fourteen (14) 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 A 149  
Little Rock, AR 72201-3325

#### DISPOSITION

Petitioner is a prisoner currently confined in the Arkansas Department of Correction. On November 9, 2018, he initiated this 28 U.S.C. § 2254 habeas action (DE # 2) along with a Motion for Leave to Proceed In Forma Pauperis (DE # 1) and Motion to Appoint Counsel (DE # 3). For the reasons set forth below, it is recommended that Petitioner’s petition be denied with prejudice.

Petitioner previously challenged his convictions pursuant to 28 U.S.C. § 2254. *See Rivers v. Hobbs*, 5:14-cv-00266-SWW. The magistrate judge recommended that the

petition be dismissed because it was time barred. *Id.* at DE # 19. The Court adopted the findings and recommendations of the magistrate judge that the petition be dismissed. The action was dismissed by judgment entered on June 16, 2015. Petitioner subsequently filed the current habeas petition.

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). Importantly, 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 for Petitioner to file and pursue this successive habeas action, he must obtain authorization from the Eighth Circuit, pursuant to 28 U.S.C. § 2244(b)(3)(A).

The instant petition is a successive petition. Petitioner does not assert that he has sought or received permission from the United States Court of Appeals for the Eighth Circuit to file this petition. He may not file a successive petition in this Court without permission of the Eighth Circuit. Furthermore, the petition is time barred. Thus, the petition should be dismissed.

#### Certificate of Appealability


When entering a final order adverse to the Petitioner, the Court must issue or deny a certificate of appealability. Rule 11 of the Rules Governing Section 2254 Cases in the United States District Court. The Court can issue a certificate of appealability only if

Petitioner has made a substantial showing that he was denied a constitutional right. 28 U.S.C. § 2253(c)(1)-(2). In this case, Petitioner has not provided a basis for issuing a certificate of appealability.

Conclusion

Based on the foregoing, it is recommended that the instant habeas petition (DE #2) be denied and dismissed with prejudice and that a certificate of appealability be denied. Furthermore, Petitioner's Motion for Leave to Proceed In Forma Pauperis (DE # 1) and Motion for Appoint Counsel (DE # 3) is DENIED as moot.

SO ORDERED this 13th day of November, 2018.



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UNITED STATES MAGISTRATE JUDGE