

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

**ORDER**

The Court has received proposed findings and recommendations from United States Magistrate Judge Jerome T. Kearney. After careful review of the findings and recommendations and the timely objections thereto, as well as a de novo review of the record, the Court concludes that the findings and recommendations should be, and are hereby, approved and adopted as this Court's findings in all respects in their entirety.

In his objections, Rivers argues that the Magistrate Judge erred in finding this a successive petition for which he must obtain Eighth Circuit approval to file because the judgment dismissing his prior petition, *Rivers v. Kelley*, No. 5:14-cv-00266, stated that the dismissal of his petition was without prejudice. Rivers argues he thus has a right to file this petition as if the prior petition had never been filed.<sup>1</sup> In support of this argument, Rivers cites *Glaus v. Anderson*, 408 F.3d 382, 385-86 (7<sup>th</sup> Cir. 2005), which noted that in the usual case, when a case is dismissed without prejudice, the plaintiff is free to re-file the

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<sup>1</sup> It appears the judgment in No. 5:14-cv-00266 should have stated that the dismissal of Rivers' petition was "with prejudice" as the Proposed Findings and Recommended Disposition that the Court adopted stated that very thing.

case. There is an exception, however, “if there is no amendment [a plaintiff] could reasonably be expected to offer to save the complaint, or if a new suit would be barred by the statute of limitations.” *Id.* at 386 (citation and internal quotation marks omitted). Rivers’ petition in No. 5:14-cv-00266 was dismissed as time-barred, and the Magistrate Judge in this case, as an alternative ground for dismissal, found that Rivers’ petition is time-barred. Accordingly, the rule in the usual case that a plaintiff may re-file a case that was dismissed without prejudice is not here applicable.

Judgment dismissing this petition will be entered accordingly. A certificate of appealability will not issue because Rivers has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(1)-(2).

IT IS SO ORDERED this 28<sup>th</sup> day of November, 2018.

/s/Susan Webber Wright  
UNITED STATES DISTRICT JUDGE