

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA

2000 APR -6 P 42

LORETTA R. WRYTE
CLERK

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

JAMES BUNCH

CIVIL ACTION

VERSUS

NO. 97-3688

BURL CAIN, WARDEN

SECTION "T" (6)

REPORT AND RECOMMENDATION

This matter was referred to the United States Magistrate Judge for the purpose of conducting hearings, including an evidentiary hearing, if necessary, and submission of proposed findings and recommendations for disposition pursuant to 28 U.S.C. § 636(b) (1)(B) and (C), and as applicable, Rule 8(b) of the Rules Governing Section 2254 Cases. Upon review of the entire record, the Court has determined that this matter can be disposed of without an evidentiary hearing. For the reasons set forth below, it is recommended that the instant petition be **DENIED WITH PREJUDICE**.

PROCEDURAL HISTORY

Petitioner, James Bunch, presently incarcerated in the Louisiana State Penitentiary located in Angola, Louisiana, was convicted on March 17, 1982, of first degree murder.¹ On

¹ See State rec., vols. 1 and 4 of 5.

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March 31, 1982, petitioner was sentenced to life imprisonment without benefit of parole, probation or suspension of sentence.² On January 13, 1983, petitioner's conviction and sentence were affirmed by the Louisiana Supreme Court. *State v. Bunch*, 426 So.2d 188 (La. 1983).

After his conviction and sentence became final, petitioner filed a total of four state applications for post-conviction relief.³ With regard to his first application, 88-KH-0044, *State ex rel. Bunch v. Butler*, 536 So.2d 1250 (La. 1989), the Louisiana Supreme Court denied relief without assigning reasons. A review of petitioner's second and third post-conviction applications, *State ex rel. Bunch v. Whitley*, 93-KH-0193, 646 So.2d 395 (La. 1994), and *State ex rel. Bunch v. State*, 96-KH-0934, 695 So.2d 1341, respectively, shows that in those two applications petitioner essentially raised the same claims raised in the instant *habeas* petition.⁴ With regard to 93-KH-0193, the Louisiana Supreme Court denied relief without assigning reasons. With regard to 96-KH-0934, the Court denied petitioner's post-conviction application as untimely pursuant to La.C.Cr.P. art. 930.8, and as successive pursuant to La.C.Cr.P. art. 930.4(D).

In connection with petitioner's final post-conviction application, petitioner was granted relief at the state district court level. On October 8, 1996, petitioner was granted a new

² See State rec., vol. 4 of 5.

³ During this same period of time, petitioner filed a writ of *habeas corpus* which this Court dismissed without prejudice due to petitioner's failure to exhaust his state court remedies. See *Bunch v. Stalder*, No. 95-1883 (E.D. La. Oct. 25, 1995).

⁴ Copies of these post-conviction applications are contained in the State rec., supplemental vol.

trial based upon evidence which came to light after petitioner's conviction and sentencing.⁵ However, in June, 1997, the Louisiana Supreme Court reinstated petitioner's conviction and sentence. *State v. Bunch*, 96-KP-2761, 695 So. 2d 1341 (La. 1997). Citing state law, along with the United States Supreme Court's decision in *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993), the Louisiana Supreme Court determined that the evidence did not warrant the granting of a new trial. *Id.* The Louisiana Supreme Court, citing La.C.Cr.P.art. 930.4(D),⁶ and *State ex rel. Bunch v. Whitley*, 646 So.2d 395 (1993), further noted that petitioner had "raised identical issues in an earlier application for post-conviction relief which this Court denied." *Id.*⁷

On November 24, 1997, petitioner tendered the instant *habeas corpus* petition for

⁵ See court reporter minutes dated October 8, 1996, a copy of which is attached to Bunch's *habeas* petition.

⁶ La.C.Cr.P. art. 930.4(D) provides: "A successive application may be dismissed if it fails to raise a new or different claim." (Emphasis added).

⁷ Generally, a federal court will not review a question of federal law decided by a state court if the decision of that state court rests on a state ground that is both independent of the merits of the federal claim and adequate to support that judgment. *Amos v. Scott*, 61 F.3d 333, 338 (5th Cir.), *cert. denied*, 116 S.Ct. 557, 133 L.Ed.2d 458 (1995), citing *Harris v. Reed*, 489 U.S. 255, 262, 109 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989). This "independent and adequate state law" doctrine applies to both substantive grounds, and to procedural grounds, such as La.C.Cr.P. arts. 930.4(D) and 930.8, and affects federal review of claims that are raised on either direct or *habeas* review. *Amos*, 61 F.3d at 338. (citations omitted). In order to fulfill the independence requirement, the last state court rendering a judgment in the case must "clearly and expressly" indicate that its judgment is independent of federal law and rests on a state procedural bar. *Amos*, 61 F.3d at 338; *Harris*, 489 U.S. at 263, 109 S.Ct. at 1043. Assuming, *arguendo*, that La.C.Cr.P. art. 930.4(D) is an adequate and independent state court doctrine, the last reasoned opinion in this case, issued by the Louisiana Supreme Court in 96-KP-2761, may have denied relief on the basis of a state procedural default. However, since the State has failed to raise the defense of procedural default, this Court shall address the instant matter on the merits.

filing. On February 10, 1998, the automatic referral of petitioner's *habeas* application to the undersigned magistrate judge was revoked and the matter was assigned to the allotted district judge.⁸ On July 21, 1999, the district court issued its Order and Reasons and Judgment dismissing petitioner's *habeas* application as untimely.⁹ On December 1, 1999, the Fifth Circuit determined that petitioner's federal *habeas* petition was filed within the applicable prescriptive period. Accordingly, the district court's Judgment was vacated and the matter was remanded for further proceedings.¹⁰ Thereafter, on December 29, 1999, the matter was once again automatically referred to the undersigned magistrate judge pursuant to LR 73.1E.

STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") includes a comprehensive overhaul of federal *habeas corpus* legislation, including 28 U.S.C. § 2254. Amended subsections 2254(d)(1) and (2) contain revised standards of review for questions of fact, questions of law and mixed questions of fact and law. *Drinkard v. Johnson*, 97 F.3d 751, 767 (5th Cir. 1996), *cert. denied*, 520 U.S. 1107, 117 S.Ct. 1114, 137 L.Ed.2d 315 (1997), *overruled in part on other grounds*, *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). As to questions of fact, the amended statute "permits federal court relief if the state court adjudication of the claim 'resulted in a decision that was based on an unreasonable determination

⁸ See rec., doc. # 4.

⁹ See rec., doc. #s 11 and 12.

¹⁰ See rec., doc. #18.