

Nos. 12-3099/3225

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 03, 2018
DEBORAH S. HUNT, Clerk

DWAYNE STOUTAMIRE,

Petitioner-Appellant,

v.

DONALD MORGAN, Warden,

Respondent-Appellee.

ORDER

Before: BOGGS, SUHRHEINRICH, and STRANCH, Circuit Judges.

Dwayne Stoutamire, an Ohio prisoner proceeding pro se, moves the court to reconsider its order, filed on September 5, 2018, denying his motion to recall the mandate that issued following this court's October 10, 2013, decision affirming the district court's judgment denying his 28 U.S.C. § 2254 habeas petition and motion for reconsideration.

Upon careful consideration, this panel concludes that the court did not misapprehend or overlook any point of law or fact when it issued its prior order denying Stoutamire's motion to recall the mandate. *See* Fed. R. App. P. 40(a). The motion for reconsideration is **DENIED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

exhibit # B

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several of Stoutamire's claims were procedurally defaulted and that Stoutamire failed to show cause and prejudice or actual innocence to overcome the procedural default. He discussed the merits of Stoutamire's remaining claims but ultimately concluded that Stoutamire was not entitled to relief. Over Stoutamire's objections, the district court adopted the magistrate judge's report and recommendation, denied habeas relief, and declined to issue a certificate of appealability ("COA"). Stoutamire filed a motion for reconsideration, which the district court denied. This court granted Stoutamire a COA on ground four but denied his request for a COA on the remaining grounds for relief. *Stoutamire v. Morgan*, Nos. 12-3099/3225 (6th Cir. Nov. 29, 2012) (order). Ultimately, this court found that the district court did not err in denying habeas relief on ground four. *Stoutamire v. Morgan*, Nos. 12-3099/3225, slip op. at 4 (6th Cir. Oct. 10, 2013) (order).

In his motion to recall the mandate, Stoutamire argues that he is actually innocent, and he contends that this court erred in affirming the district court's denial of habeas relief on ground four and in denying his application for a COA on his remaining grounds for relief.

This court has the "inherent power" to recall a mandate, *Calderon v. Thompson*, 523 U.S. 538, 549 (1998), but "such power should only be exercised in extraordinary circumstances because of the profound interests in repose attached to a court of appeals mandate." *United States v. Saikaly*, 424 F.3d 514, 517 (6th Cir. 2005). Furthermore, because this is a habeas case and because Stoutamire's claims challenge "the merits of the underlying decision," his motion to recall the mandate must "be regarded as a second or successive application for purposes of § 2244(b)." *Calderon*, 523 U.S. at 553. Thus, the motion to recall the mandate "must satisfy the requirements for the filing of a second or successive petition as outlined in § 2244(b)." *Workman v. Bell*, 227 F.3d 331, 334 (6th Cir. 2000) (citing *Calderon*, 523 U.S. at 553).

Under § 2244(b), any claim that was raised in a prior § 2254 petition "shall be dismissed." 28 U.S.C. § 2244(b)(1). A new ground for relief will be authorized only if the petition "makes a prima facie showing" that it contains a claim premised on: (1) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was

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previously unavailable”; or (2) newly discovered facts, which “if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.” 28 U.S.C. § 2244(b)(2)(A)-(B), (b)(3)(C).

To the extent that Stoutamire seeks to relitigate ground four of his prior habeas petition and the other non-certified habeas claims that he raised in that petition, his claims are subject to dismissal under § 2244(b)(1). To the extent that Stoutamire argues that he is actually innocent, he has not presented any newly discovered facts to support that claim. *See* 28 U.S.C. § 2244(b)(2)(B). Instead, he merely points out alleged weaknesses in the evidence that the State presented at trial. Stoutamire did submit a written statement from an individual named Ronald Jones, but the allegations contained therein are insufficient to show that Stoutamire is actually innocent. This court found as much when it denied Stoutamire’s prior motion for authorization to file a second or successive § 2254 petition, which relied on the same written statement. *See In re Stoutamire*, No. 15-4025, slip op. at 4 (6th Cir. May 6, 2016) (order).

Accordingly, this court **DENIES** Stoutamire’s motion to recall the mandate.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

RECEIVED

MAR 26 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

To The clerk of court

March 15th, 19

I attempted to file A motion for extension of time to file a writ of certiorari and this office declined to file my motion on the belief that I was attempting to file my extension After the mandate was issued, making my motion untimely.

But if this office looks at the order I attached to my motion for a extension of time, it is from the a Ruling from reconsideration before the sixth circuit where the sixth circuit denied my motion for reconsideration from the denial to recall the mandate before the sixth circuit.

I fail to see how my motion was not filed because I did everything right.

The sixth circuit denied my motion for reconsideration from the denial of my motion to recall the mandate on December 3rd, 2018 (Wayne Stoutamire v. Christopher LaRose, case no. 12-3099 / 3225), the time to file my writ of certiorari starts to tick the day After this decision pursuant to Supreme court Rule 13.3, making the time to file my writ on March —, 2019. I sent my motion for a extension of time to this court on the 20th of february, 2019 with a Declaration of Service (prison mailbox Rule) pursuant to Supreme court Rule 29.2.

This office declined to file my motion under the pretense that I was untimely because I was going off of the time from the mandate (See Attached letter)

But this office is wrong, I am going off of the Sixth
circuits order denying my motion for reconsideration.
All this office has to do is look at the Sixth circuits
docket (Dwayne Stoutamire v. LaRose, 12-3099 / 3225)
And it will see that my motion for reconsideration was
denied on Dec. 3rd, 2018 or look at the order attached
to my motion for extension of time.

So I ask that this office consider my motion for
extension of time to be timely filed.

Thank you and respectfully submitted,

Dwayne Stoutamire

exhibit #

mailbox rule statement # A

The United States court of
Appeals for the sixth circuit decision . . . # B

Mailbox Rule

I come before this court in the attempt to utilize this courts prison mailbox Rule pursuant to the Supreme court Rule 29.2.

I am a pro se inmate who is incarcerated at NEO.C.C. . I state that I placed this motion in the prison mailbox on february 20th, 2019, before the 10 day deadline for filing a motion for extension of time.

So I state under the penalty of perjury that all is true and correct. So I ask the court to consider my motion timely filed.

Dwayne Stoutamire
Dwayne Stoutamire

(exhibit # A)