

No. _____

18-8989

IN THE
SUPREME COURT OF THE UNITED STATES

Dwayne Stoutamire — PETITIONER
(Your Name)

vs.

ORIGINAL

Christopher La Rose — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

FILED
APR 18 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

The United States Court of Appeals for the Sixth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Dwayne Stoutamire # 532-253
(Your Name)

2240 Hubbard rd
(Address)

YOUNGSTOWN, OHIO 44505
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

IS my motion to recall the mandate a second or successive petition?

If my motion to recall the mandate is considered a second or successive application did the court of appeals fail to consider relevant evidence in its inquiry?

Did the court of appeals the proper review under section 2244 (b)?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was September 5, 2019

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: December 3, 2019, and a copy of the order denying rehearing appears at Appendix B.

An extension of time to file the petition for a writ of certiorari was granted to and including May 2, 2019 (date) on April 1st, 2019 (date) in Application No. 18 A 993.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

I filed a habeas corpus petition before the district court for the northern district of ohio (Dwayne stoutamire v. Donald Morgan, case no. 4:10-cv-02657) in which the district court denied my petition (Doc.# 46).

I timely appealed to the united states court of appeals for the sixth circuit (case no. 12-3099 / 12-3225) and the court of appeals granted me a certificate of Appealability (COA) in part and denied the rest of my issues at the COA stage.

I timely appealed to this court seeking a COA but this court declining to grant me a COA.

so I went back before the court of Appeals raising Actual INNOCENCE as a basis for the court of Appeals to allow my motion for recall of Mandate to be considered. but that court declined to consider my motion on the position that they believe that my motion was in fact a second or successive petition and proceeded to consider my motion under U.S.C.A. 2244 (b) (exhibit # A at pages 2 - 3). The court of appeals denied my motion on this position. I timely filed a motion for rehearing but the sixth circuit denied my motion.

so now I come before this honorable court showing that the court of Appeals was wrong that my motion for recall of Mandate was a second or successive petition, or in the alternative, that this issue is something that deserves further review.

Did the court of Appeals abuse their discretion when it denied my motion to recall the mandate?

This court has determined that a court of Appeals decision whether to recall their mandate can only be reviewed under a abuse of discretion.

"The courts of Appeals are recognized to have an inherent power to recall their mandates, subject to review for an abuse of discretion." *Calderon v. Thompson*, 523 U.S. 538, 549 (1998)

The only court to determine if a court abused their discretion is a higher court, surely not the court who made the decision in the first instance. So I ask this court to please except review of this issue because the court of Appeals clearly abused their discretion.

Is my motion to recall the mandate a second or successive petition?

The sixth circuit denied my motion to recall my mandate on the position that it is a second and successive petition (exhibit # A at pages 2 - 3).

I ask the court to be patient in its consideration of the facts and to take notice that my motion to recall the mandate concerns two separate issues.

in the first issue it concerned a claim that was reviewed by the court of appeals, prejudicial joinder of offenses (Dwayne Stoutamire v. Christopher LaRose, 12-3099 (322.5 at pages - 1). but this court has stated that if a petitioner can show that they are actually innocence under the miscarriage of justice standard then the court of appeals can revisit the merits of a claim.

"The miscarriage of justice exception, our decision bear out, survived AEDPA's passage. in Calderon v. Thompson, 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed. 2d 728 (1998), we applied the exception to hold that a federal court may, consistent with AEDPA, ... recall its mandate in order ... to revisit the merits of a decision." McQuiggin v. Perkins, 569 U.S. 383, 393 (2012)

thus, this court has stated that if a petitioner can show his innocence in the recall of the mandate stage then the court of appeals can revisit the merits of a decision. So the court of appeals should have not relied on the second or successive application because it does not apply. instead the sixth circuit should have applied the actual innocence standard articulated in, Schlip v. Dole, 513 U.S. 298 (1995), the court of appeals held me to the second or successive application laid out in U.S.C.A. 2244(b), which should not have been applied. So I ask the court to remand my claim of prejudicial joinder of offenses back to the court of appeals instructing them to consider my recall of the mandate motion under

the traditional actual innocence standard rather under section 2244 (b).

The second part of my recall of Mandate Motion concern the denial of my certificate of Appealability (COA). The Second or Successive application cannot apply to issues in a COA inquiry because issues in such inquiry are not a merits decision.

First I ask the court to focus on the definition of a Second or Successive petition. There is not a firm definition of this phrase but it is clear that section 2244 (b) does not apply to every application.

" The phrase "Second or successive" is not self-defining. It takes its full meaning from our case law, including decisions predating the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The court has declined to interpret "Second or successive" as referring to all § 2254 applications filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior § 2254 application. " *Panetti v. Quarterman*, 551 U.S. 930, 943 - 944 (2007)

" The phrase "Second or successive petition" is a term of art given substance in our prior habeas corpus cases. "

Slack v. McDaniel, 529 U.S. 473, 486 (2000)

Section 2244 (b) focuses on the "application" before the court and the "claims" presented.

" the limitations imposed by 2244 (b) apply... only... "

to a habeas corpus "application" under section 2254, that is, an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court.¹⁹ *Magwood v. Patterson*, 561 U.S. 320, 332 (2010)

" As a textual matter, 2244(b) applies only where the court acts pursuant to a prisoner's "application" for a writ of habeas corpus."²⁰ *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005)

I am not attempting to obtain relief from a state court judgment, something the writ of habeas corpus focuses on.

" The reference to a state - court judgment in 2254(b) is significant because the term "application" cannot be defined in a vacuum."²¹ *Magwood*, *supra*, 561 U.S. at 332

" it is clear that for purposes of 2244(b) an "application" for habeas relief is a filing that contains one or more claims."²² *Gonzalez*, *supra*, 545 U.S. at 530

" Because the question whether Slack's petition was second or successive implicates his right to relief in the state court."²³ *Slack v. McDaniel*, 529 U.S. 473, 486 (2000)

" a petitioner is applying for something: this petition seeks invalidation (in whole or in part) of the judgment authorizing the prisoner's confinement."²⁴ *Magwood*, *supra*, 561 U.S. at 332

I am not presenting my motion to recall the mandate in order to obtain federal habeas corpus relief,

I am merely presenting it so the court of appeals may grant me a COA, a issue that does not focus on granting any claim on the merits but instead a procedural issue.

so the question before the court is if a issue dealing with the denial of a COA can be considered a second or successive petition in the recall of mandate context.

The COA step is a unique and distinct step that does not focus on if the court may grant relief under § 2254, but instead a procedural rule that must be determined so the court of appeals may have jurisdiction to beable to consider the constitutional claims in a 2254(d) petition.

" while an appeal is a continuation of the litigation started in the trial court, it is a distinct step." slack, supra, 529 U.S. at pg. 481

" the COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal." id. at 482

" until a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." Miller-EL v. Cockrell, 537 U.S. 322, 336 (2003)

thus at this juncture I am not presenting a "claim" in order to obtain habeas corpus relief, something section 2244(b) focuses on, and even at this juncture the court of appeals does not have the power or jurisdiction to grant any claim for habeas corpus relief in the COA inquiry.

At the COA stage it is only the court of appeals power to follow the letter of section 2253 and do a threshold inquiry of the constitutional claims in order to determine if the court has jurisdiction, not to determine if relief could be granted on the merits. I only presented claims was in order to meet section 2253 procedural rules and to show that my issues were substantial claims.

So I have not presented a "claim" as interpreted by this court which would invoke section 2244(b). So I ask this honorable court to remand my issues back to the Sixth circuit instructing them that my motion for a recall of mandate is not a second or successive petition and that my recall of mandate should be reviewed under the actual innocence (miscarriage of justice) gateway stated in, *McQuiggin v. Perkins*, 569 U.S. 383, 393 (2012); *Hause v. Bell*, 126 S. Ct. 2064 (2006) and *Schlup v. Delo*, 513 U.S. 298, 118 S. Ct. 851 (1995).

The Sixth circuit failed to consider this court's standard of miscarriage of justice when determining to recall the mandate pursuant to this recall of mandate pursuant to the Ruling in, *Calderon v. Thompson*, 523 U.S. 538, (1998), but instead ruled on the facts I presented in support of my actual innocence under the more stringent standard under 2244(b).

So I ask this honorable court to remand this back to the Sixth circuit instructing them to review my motion

to recall the mandate under this miscarriage of justice standard stated in, Calderon v. Thompson, supra, and not 2244 (b).

If my motion to Recall the Mandate is considered a second or successive application did the court of appeals fail to consider relevant evidence in its inquiry?

Before I proceed I wish to make clear to the court to determine if the court of appeals was right in its determination if section 2244 (b) was met, my issue concern the fact that the court of appeals did not consider a number of documents that could show the second part of section 2244 (b). See section 2244 (b)(2)(B).

In support of my actual innocence argument I presented over 8 documents, the court of appeals only consider one of these documents of evidence, that of a written statement of a Ronald Jones (exhibit* A at page 3). So my issue is that the court of appeals never considered over 7 pieces of evidence that could have shown I met section 2244 (b).

Another issue the court of appeals failed to consider when it made a review of section 2244 (b) is the fact that their review was merely to be a 'prima facie' determination.

So my sub-question is:

Did the court of appeals apply ^{the} proper review under section 2244 (b)?

"In order for this court to grant permission to file a second or successive habeas petition, the application must ... make a prima facie showing ... that his application satisfies the statutory requirements." *In re DeWitt McDonald*, 514 F.3d 539, 544 (6th Cir. 2008)

The court of appeals does not even mention this 'prima facie' showing but instead required me to meet Section 2244(b) in its entirety rather than the lower standard of review. So I ask the court to remand this back to the court of appeals requiring them to review the facts relevant under the lower 'prima facie' standard because I am only required to meet Section 2244(b) fully before the District court.

So I ask the court to remand my motion back to the court of appeals so they may consider the correct application of Section 2244 and consider all of the evidence that I presented in support of my ~~unlawful~~ INNOCENCE.

REASONS FOR GRANTING THE PETITION

I ask this honorable court to grant my petition due to the sixth circuit improperly reviewing my motion to recall the mandate under section 2244(b).

In my motion to recall the mandate it concerns my issues around the denial of my COA. This court has stated that section 2244(b) deals with claims that would be able to grant relief through section 2254, my recall of the mandate does not seek relief for my constitutional claims under 2254 but seeking jurisdiction before the court of appeals so they may consider the issues that were before the district court, pursuant to section 2253.

So I ask that this court grant review of this topic or remand my recall of the mandate back to the court of appeals instructing them that it is not a second or successive petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dwayne Stratman

April 18th

Date: April 18th, 2019