

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RICKY LEE WHEELDON,

Petitioner,

v.

Civil No. 2:16-CV-10041

HONORABLE ARTHUR J. TARNOW

UNITED STATES DISTRICT JUDGE

SHERMAN CAMPBELL,

Respondent.

_____ /

**OPINION AND ORDER DENYING THE MOTION FOR RECONSIDERATION
AND DIRECTING THE CLERK OF THE COURT TO TRANSFER THE MOTION
FOR A CERTIFICATE OF APPEALABILITY TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT**

On May 19, 2016, this Court issued an opinion and order denying petitioner's application for writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. The Court declined to issue a certificate of appealability but granted petitioner leave to appeal *in forma pauperis*. *Wheeldon v. Campbell*, No. 2:16-CV-10041, 2016 WL 2910083 (E.D. Mich. May 19, 2016). On June 14, 2016, the Court granted petitioner an extension of time to file his reply brief but again denied habeas relief.

Petitioner has now filed a notice of appeal with the United States Court of Appeals for the Sixth Circuit. See Dkt. # 14. Petitioner has also filed a motion for a certificate of appealability, which this Court will treat in part as a motion for reconsideration of the Court's prior decision to deny petitioner a certificate of appealability. For the reasons that follow, the Court will deny petitioner's motion

for reconsideration. The Court will further order that petitioner's motion for a certificate of appealability be transferred to the United States Court of Appeals for the Sixth Circuit.

Because this Court previously denied petitioner a certificate of appealability when it denied the petition for writ of habeas corpus, the Court will initially construe petitioner's motion for a certificate of appealability as a motion for reconsideration of the Court's prior order to deny a certificate of appealability in this case. See *e.g. Jackson v. Crosby*, 437 F. 3d 1290, 1294, n. 5 (11th Cir. 2006).

U.S. Dist.Ct. Rules, E.D. Mich. 7.1 (h) allows a party to file a motion for reconsideration. A motion for reconsideration should be granted if the movant demonstrates a palpable defect by which the court and the parties have been misled and that a different disposition of the case must result from a correction thereof. *Ward v. Wolfenbarger*, 340 F. Supp. 2d 773, 774 (E.D. Mich. 2004)(citing L.R. 7.1(g)(3)). A motion for reconsideration which merely presents "the same issues ruled upon by the Court, either expressly or by reasonable implication," shall be denied. *Id.*

In his motion for a certificate of appealability, petitioner advances the same arguments that he made in his initial petition for writ of habeas corpus and reply brief and which were considered and addressed by this Court when the Court denied petitioner habeas relief and declined to grant him a certificate of appealability. Petitioner's request for reconsideration will therefore be denied, because petitioner is merely presenting issues which were already ruled upon by

this Court, either expressly or by reasonable implication, when the Court denied petitioner's application for writ of habeas corpus and denied him a certificate of appealability. See *Hence v. Smith*, 49 F. Supp. 2d 547, 553 (E.D. Mich. 1999).

This Court further notes that the proper procedure when a district court denies a certificate of appealability is for the petitioner to file a motion for a certificate of appealability before the appellate court in the appeal from the judgment denying the petition for writ of habeas corpus or the motion to vacate sentence. See *Sims v. U.S.*, 244 F. 3d 509 (6th Cir. 2001)(citing Fed. R.App. P. 22(b)(1)). In light of the fact that this Court has already denied petitioner a certificate of appealability, petitioner should direct his request for a certificate of appealability to the Sixth Circuit. The Court, in the interests of justice, will order that petitioner's motion for a certificate of appealability to be transferred to the United States Court of Appeals for the Sixth Circuit.

ORDER

IT IS HEREBY ORDERED that petitioner's request for reconsideration of the Court's previous denial of a certificate of appealability is **DENIED**.

IT IS FURTHER ORDERED that the Clerk of the Court transfer petitioner's "Motion for A Certificate of Appealability" [Dkt. # 16] to the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1631.

Dated: March 3, 2017

s/Arthur J. Tarnow
HONORABLE ARTHUR J. TARNOW
UNITED STATES DISTRICT JUDGE

However, after reviewing petitioner's arguments in his reply brief, this Court will again deny habeas relief for the reasons stated in the original opinion and order denying habeas relief. Any error in denying habeas relief without reviewing petitioner's reply brief has now been rendered harmless by the Court's curative action in accepting and reviewing petitioner's belated reply brief. *Williams v. Warrior*, 631 F. App'x 587, 591 (10th Cir. 2015).

ORDER

IT IS ORDERED that the motion for an enlargement of time to file a reply brief (Dkt. # 10) is **GRANTED**. The Clerk of the Court is ordered to accept the reply brief (Dkt. # 11) and the exhibits (Dkt. # 12) for filing.

IT IS FURTHER ORDERED that the petition for writ of habeas corpus is again **DENIED WITH PREJUDICE** for the reasons stated by the Court in its opinion and order dated May 19, 2016.

Dated: March 3, 2017

s/Arthur J. Tarnow
HON. ARTHUR J. TARNOW
UNITED STATES DISTRICT COURT