

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON**

LOWELL N. PAYNE, JR.,

Petitioner,

: Case No. 3:14-cv-358

- vs -

District Judge Walter Herbert Rice  
Magistrate Judge Michael R. Merz

C. BRADLEYM Warden, Franklin  
Medical Center,

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Respondent.

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**TRANSFER ORDER**

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Petitioner Lowell N. Payne, Jr., brings this habeas corpus action under 28 U.S.C. § 2254 to obtain relief from his convictions for rape in the Montgomery County Common Pleas Court in that court's case number 88-cr-960.

In the Antiterrorism and Effective Death Penalty Act of 1996, Congress enacted 28 U.S.C. § 2244(b) which provides:

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, 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.

A district court lacks jurisdiction to consider a second or successive petition without approval by the circuit court. *Burton v. Stewart*, 549 U.S. 147 (2007).

The standard form for § 2254 Cases asks the petitioner whether he has “previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition?” Payne has answered that question “no.” (Petition, Doc. No. 1-1, PageID 14). However, an examination of this Court’s docket reveals Payne has previously challenged this conviction in this Court in at least the following cases: 3:89-cv-485, 3:94-cv-477, 3:97-cv-484, 3:98-cv-223, and 3:11-cv-189; most of these are styled as habeas corpus petitions.

The Sixth Circuit has commanded that under these circumstances, a case should be transferred to it for consideration of whether permission should be granted to file a second or successive petition. *In re Sims*, 111 F.3d 45 (6<sup>th</sup> Cir. 1997). Accordingly, pursuant to 28 U.S.C. § 1651, this case is ORDERED transferred to the United States Court of Appeals for the Sixth Circuit.

October 22, 2014.

s/ *Michael R. Merz*  
United States Magistrate Judge