

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

JAVELEN WOLFE,

Petitioner,

: Case No. 3:17-cv-094

- vs -

District Judge Walter Herbert Rice  
Magistrate Judge Michael R. Merz

RHONDA RICHARD, Warden,  
Madison Correctional Institution,

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Respondent.

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**TRANSFER ORDER**

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This habeas corpus action under 28 U.S.C. § 2254 is before the Court on Respondent's Motion to Transfer the case as a second or successive habeas corpus application which requires permission from the circuit court before it can proceed (ECF No. 6).

A district court has no jurisdiction to consider the merits of a second or successive habeas petition. *Franklin v. Jenkins*, 839 F.3d 465(6<sup>th</sup> Cir. 2016); *Burton v. Stewart*, 549 U.S. 147 (2007). However, it is the district court which must decide in the first instance whether a habeas application is second or successive. *In re: Kenneth Smith*, 690 F.3d 809 (6<sup>th</sup> Cir. 2012); *In re Sheppard*, 2012 U.S. App. LEXIS 13709 (6<sup>th</sup> Cir. May 25, 2012).

Mr. Wolfe in the instant case is challenging his conviction and imprisonment under the same judgment he previously attacked in *Wolfe v. Warden*, No. 3:09-cv-442. This Court entered final judgment dismissing that case with prejudice as barred by the statute of limitations. *Wolfe v. Warden*, 2010 WL 552130 (S.D. Ohio Feb. 6, 2010). The only changes to the underlying judgment have been nunc pro tunc entries correcting or adding the statutory reference and

include the jail time credit. These amendments do not create changes in the judgment sufficient to allow a second-in-time habeas application to be counted as if it were an original application.

*Compare Crangle v. Kelly*, 838 F.3d 673, 680 (6<sup>th</sup> Cir. 2016).

Accordingly, the Warden's Motion is GRANTED and it is hereby ORDERED that the Clerk transfer this case to the Sixth Circuit Court of Appeals for its determination of whether Mr. Wolfe's instant Petition should be permitted to proceed.

May 22, 2017.

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