

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

July 3, 2012

FOR THE TENTH CIRCUIT

**Elisabeth A. Shumaker
Clerk of Court**

In re:

RONALD JENNINGS FOGLE,

Movant.

No. 12-1252
(D.C. No. 1:10-CV-00932-LTB)
(D. Colo.)

ORDER

Before **MURPHY, HOLMES, and MATHESON**, Circuit Judges.

Movant Ronald Jennings Fogle, a Colorado state prisoner appearing pro se, has filed his second motion seeking authorization to file a second or successive 28 U.S.C. § 2254 petition. We deny authorization.

In 2000, Mr. Fogle was convicted in Colorado state court of one count of second degree kidnapping, three counts of robbery, one count of aggravated robbery, one count of attempted aggravated robbery, and one count of attempt to escape. He pursued unsuccessful direct and collateral state appeals, and the Colorado Supreme Court denied review of his final motion for postconviction relief on July 16, 2007. He is currently serving a sentence of 64 years pursuant to the court's adjudication that he is a habitual offender, based on his Colorado convictions and on his 1997 convictions in Maryland for one count of felony theft, three counts of robbery, and two counts of conspiracy to commit robbery. His first § 2254 petition, filed August 2, 2007, was denied as untimely and this court denied his application for a

certificate of appealability (COA), *Fogle v. Estep*, 220 F. App'x 814 (10th Cir. 2007). His second § 2254 petition, filed November 26, 2007, was also denied, and again this court denied a COA, *Fogle v. Smelser*, 314 F. App'x 89 (10th Cir. 2008). Mr. Fogle filed his third § 2254 petition in the district court on April 26, 2010. The district court entered an order of dismissal on June 22, 2010.

A second or successive § 2254 claim must first be authorized by this court. 28 U.S.C. § 2244(b)(3). This court may authorize a claim only if the prisoner makes a prima facie showing that the claim relies on (A) “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,” or (B) new facts that “could not have been discovered previously through the exercise of due diligence” and that “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.” *Id.* § 2244(b)(2), (b)(3)(C).

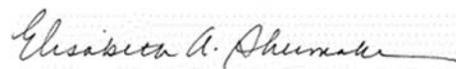
Mr. Fogle argues that new Supreme Court law authorizes another § 2254 petition. He contends that a new judgment was entered when a Colorado court corrected his mittimus on June 30, 2008, to reflect that he was subject to discretionary parole rather than mandatory parole. He relies on *Magwood v. Patterson*, 130 S. Ct. 2788, 2802 (2010), which held that “where . . . there is a new judgment intervening between the two habeas petitions, an application challenging

the resulting new judgment is not ‘second or successive’ at all.” (citation omitted) (internal quotation marks omitted). *Magwood* is inapplicable to Mr. Fogle’s case for two reasons. First, the mittimus was corrected before Mr. Fogle filed his third habeas petition on April 26, 2010, so he is foreclosed from claiming that a new judgment intervened between his April 26, 2010, petition and any petition filed in the future.

Second, Mr. Fogle did not have a new sentencing proceeding, “where the state court conducted a full resentencing and reviewed the [relevant sentencing] evidence afresh.” *Id.* at 2801. The correction of Mr. Fogle’s mittimus did not entail a review of the evidence or result in a new judgment, and he does not raise any challenge to the corrected mittimus. Rather, after his mittimus was corrected in 2008, Mr. Fogle remained in custody pursuant to the 2000 judgment. Therefore, his attempt to bring another § 2254 petition challenging his 2000 judgment would be the third time he “brought claims contesting the same custody imposed by the same judgment of a state court. As a result, under AEDPA, he was required to receive authorization from the Court of Appeals before filing his second [and successive] challenge[s].” *Burton v. Stewart*, 549 U.S. 147, 153 (2007) (per curiam) (holding second § 2254 petition challenging sentencing issues not brought in prior § 2254 petition was a second or successive attempt because at the time of the later filing petitioner “was still being held in custody pursuant to the [original] judgment [of conviction]”).

The motion for authorization is DENIED. This denial of authorization “shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.” 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", written in black ink on a light-colored background.

ELISABETH A. SHUMAKER, Clerk