

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

May 3, 2013

FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

In re:

XEZAKIA ROUSE,

Petitioner.

No. 13-2064
(D.C. No. 1:11-CV-00405-JCH-SMV)
(D. N.M.)

ORDER

Before **GORSUCH**, **EBEL**, and **O'BRIEN**, Circuit Judges.

This matter is before us on petitioner's application for a writ of mandamus and his motion to proceed without prepayment of fees and costs. Petitioner seeks an order of this court directing the district court to consider and decide his pending 28 U.S.C. § 2254 habeas application. He asserts that time is of the essence because the sentence he is challenging is due to expire on May 13, 2013.

"[A] writ of mandamus is a drastic remedy, and is to be invoked only in extraordinary circumstances." *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1186 (10th Cir. 2009) (quotation omitted). "For mandamus to issue, there must be a clear right to the relief sought, a plainly defined and peremptory duty on the part of respondent to do the action in question, and no other adequate remedy available." *Johnson v. Rogers*, 917 F.2d 1283, 1285 (10th Cir. 1990). In *Johnson*, this court held

that a fourteen-month delay in deciding a habeas case “for no reason other than docket congestion” warranted mandamus relief. *Id.*

Petitioner filed his habeas application in May 2011. The district court denied him relief under § 2254 and entered judgment against him in March 2012. Petitioner sought a certificate of appealability (COA) in this court, which we granted on two claims alleging ineffective assistance of counsel. On October 23, 2012, we vacated the district court’s order denying relief on these two claims and remanded the matter to the district court for further proceedings consistent with our order granting a COA. *See Rouse v. Romero*, No. 12-2043 (10th Cir. Oct. 23, 2012).

Six months have elapsed since this court remanded petitioner’s case to the district court. In arguing that the court has not promptly issued a decision, petitioner ignores the extent to which his own filings have resulted in delay. The district court has considered and ruled on several of the numerous motions and other pleadings petitioner has filed since the case was remanded, including his amended § 2254 petition filed without leave of court, which the district court sua sponte dismissed for lack of jurisdiction. *See Romero v. Rouse*, No. 1:11-CV-00405-JCH-SMV (D.N.M. Mar. 8, 2013). Petitioner then attempted to appeal that order, while continuing to press the district court for an expedited ruling. The district court’s most recent action in the case was on April 17, 2013, when it denied petitioner’s Motion for Expedited Ruling, concluding that it did not have jurisdiction to proceed while petitioner’s appeal was pending in this court. *See Rouse v. Romero*,

No. 1:11-CV-00405-JCH-SMV (D.N.M. Apr. 17, 2013). We ultimately dismissed petitioner's appeal for lack of jurisdiction. *See Rouse v. Romero*, No. 13-2049 (10th Cir. Apr. 18, 2013). Although the district court has not yet entered a final ruling, petitioner has not established that his case is not proceeding in the district court.

Nor has petitioner substantiated his claim that his sentence is due to expire on May 13, 2013. In response to that claim, the respondent in the district court filed a document from the New Mexico Department of Corrections indicating that petitioner forfeited good time credits as a result of a prison disciplinary action, which changed his projected release date to April 2014. *See Rouse v. Romero*, No. 1:11-CV-00405-JCH-SMV (D.N.M. Apr. 12, 2013). Petitioner has not submitted contrary evidence to this court, and in the district court he argued only that he is challenging the disciplinary action.

Accordingly, the petition for writ of mandamus is denied. The motion for leave to proceed without prepayment of costs and fees is granted.

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