

No. 19-1002

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Jun 06, 2019

DEBORAH S. HUNT, Clerk

MARCUS JACKSON,
Petitioner-Appellant,
v.
NOAH NAGY, Warden,
Respondent-Appellee.

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O R D E R

Before: GUY, GILMAN, and DONALD, Circuit Judges.

Marcus Jackson, a Michigan prisoner proceeding pro se, petitions for rehearing en banc of this court's order entered April 3, 2019, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

May 21, 2019

DEBORAH S. HUNT, Clerk

MARCUS JACKSON,

Petitioner-Appellant,

v.

NOAH NAGY, Warden,

Respondent-Appellee.

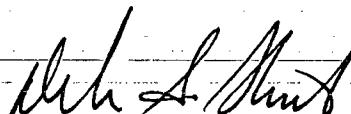
ORDER

Before: GUY, GILMAN, and DONALD, Circuit Judges.

Marcus Jackson, a Michigan prisoner proceeding pro se, petitions the court to rehear en banc its order denying him a certificate of appealability. The petition has been referred to this panel, on which the original deciding judge does not sit, for an initial determination on the merits of the petition for rehearing. Upon careful consideration, the panel concludes that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, declines to rehear the matter. Fed. R. App. P. 40(a).

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARCUS JACKSON,

Petitioner-Appellant,

v.

NOAH NAGY, Warden,

Respondent-Appellee.

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ORDER

FILED

Apr 03, 2019

DEBORAH S. HUNT, Clerk

Marcus Jackson, a Michigan prisoner proceeding pro se, appeals the district court's order denying his motion for relief from judgment filed pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. He has filed an application for a certificate of appealability ("COA"), *see* Fed. R. App. P. 22(b), as well as a motion to proceed in forma pauperis on appeal, *see* Fed. R. App. P. 24(a).

A Michigan trial court sentenced Jackson to what is, in effect, a life sentence without parole after a jury convicted him of first-degree murder, assault with intent to murder, armed robbery, possessing a firearm during the commission of a felony, and being a felon in possession of a firearm. The Michigan Court of Appeals affirmed Jackson's convictions. *People v. Jackson*, No. 237766, 2003 WL 1365232, at *5 (Mich. Ct. App. Mar. 18, 2003) (per curiam), *perm. app. denied*, 670 N.W.2d 221 (Mich. 2003). Jackson subsequently filed a state post-conviction motion for relief from judgment, which the trial court denied and the Michigan appellate courts denied leave to appeal. *People v. Jackson*, No. 267915 (Mich. Ct. App. Aug. 2, 2006) (order); *People v. Jackson*, 723 N.W.2d 880 (Mich. 2006).

In 2006, Jackson filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, in which he alleged that his confession was involuntary, the police search of his vehicle was illegal, the prosecutor committed misconduct, and trial and appellate counsel rendered ineffective assistance. The district court denied some of the claims on the merits and others as procedurally defaulted. *See Jackson v. Metrish*, No. 06-CV-15464, 2009 WL 3818159, at *9-12 (E.D. Mich. Nov. 13, 2009). This court issued Jackson a COA but only with respect to his ineffective-assistance-of-trial-counsel claim. *Jackson v. Metrish*, No. 09-2569 (6th Cir. Nov. 17, 2010) (order). This court ultimately affirmed the district court's denial of Jackson's claim that trial counsel provided ineffective assistance. *Jackson v. Metrish*, 485 F. App'x 781, 783 (6th Cir. 2012).

In November 2018, Jackson filed a Rule 60(b)(6) motion, in which he sought relief from the district court's November 2009 judgment denying his § 2254 petition. He specifically sought relief from the district court's determination that he had procedurally defaulted his ineffective-assistance-of-counsel claims, arguing that he was unable to pursue those claims until "after [his] direct appeal proceedings were completed." Jackson alleged that, after this court granted in part and denied in part his COA application in November 2010, the attorney whom he had retained to represent him in his habeas proceedings abandoned him and thus never filed a Rule 60(b) motion on his behalf challenging the district court's procedural default determinations. The district court denied Jackson's Rule 60(b)(6) motion after finding that "[n]o lawyer has ever entered an appearance for petitioner in this matter, either in this Court or in the Sixth Circuit." The district court alternatively concluded that Jackson's motion was "grossly untimely" because he did not file it within a reasonable amount of time. The district court also declined to issue a COA, and this appeal followed.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

Because Jackson appeals the denial of a Rule 60(b)(6) motion, he must demonstrate that jurists of

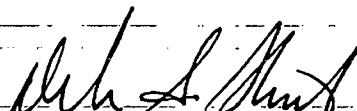
reason “could conclude that the District Court abused its discretion in declining to reopen the judgment.” *Buck v. Davis*, 137 S. Ct. 759, 777 (2017).

Jackson brought his motion for relief from judgment under Rule 60(b)(6), the residual clause of the rule. A movant seeking relief under Rule 60(b)(6) must “show ‘extraordinary circumstances’ justifying the reopening of a final judgment.” *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)). Jackson argued that his retained counsel’s abandonment was such a circumstance. However, even if Jackson could show abandonment or other exceptional circumstances justifying relief under Rule 60(b)(6), his motion is untimely. A motion seeking relief under Rule 60(b)(6) “must be made within a reasonable time” after a judgment or order is entered. Fed R. Civ. P. 60(c)(1). “Whether the timing of the motion is reasonable ‘ordinarily depends on the facts of a given case including the length and circumstances of the delay, the prejudice to the opposing party by reason of the delay, and the circumstances compelling equitable relief.’” *Thompson v. Bell*, 580 F.3d 423, 443 (6th Cir. 2009) (quoting *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990)).

The district court denied Jackson’s habeas petition on November 13, 2009, and Jackson alleged that his retained attorney abandoned him when this court granted his COA application in part on November 17, 2010. However, Jackson waited until November 9, 2018, to file his Rule 60(b)(6) motion. Jackson neither explained the reason for this multi-year delay nor presented any circumstances compelling equitable relief. Reasonable jurists therefore would not debate the district court’s denial of Jackson’s Rule 60(b)(6) motion.

Accordingly, Jackson’s COA application is **DENIED**, and his motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

APPENDIX (C)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARCUS JACKSON, 195116,

Petitioner,

Civil Action No. 06-CV-15464

vs.

HON. BERNARD A. FRIEDMAN

LINDA M. METRISH,

Respondent.

ORDER DENYING PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT

This is an old, and conclusively resolved, habeas case. The Court denied the petition in November 2009. The Sixth Circuit affirmed in August 2012. The Supreme Court denied cert in April 2013. Now petitioner seeks relief from the judgment [docket entry 50] pursuant to Fed. R. Civ. P. 60(b)(b) on the grounds that his attorney "abandoned the case and her client after [the] motion for [a] certificate of appealability was denied." Pet'r's Mot. at 3. The Court denied petitioner's motion for a certificate of appealability in December 2009. Petitioner says his attorney "remain[ed] as Petitioner's attorney of record up until 1/14/2011." Pet'r's Br. at 2.

Petitioner claims that in 2008 his sister hired a lawyer "to handle all proceedings moving forward relating to any habeas corpus action, including the 60(b) motion proceeding" and that this lawyer neglected to file a Rule 60(b) motion. Pet'r's Mot. at 4. No lawyer has ever entered an appearance for petitioner in this matter, either in this Court or in the Sixth Circuit. Assuming one had done so, and assuming further that she had neglected to file a promised motion, and assuming further that this constituted an extraordinary circumstance warranting relief under Rule 60(b)(6), the

Court would still deny the instant motion because it is grossly untimely. A motion under Rule 60(b)(6) "must be made within a reasonable time." Fed. R. Civ. P. 60(c)(1). The instant motion

was filed five and one-half years after the Supreme Court denied petitioner's cert petition, seven and one-half years after the lawyer allegedly stopped representing him, and nearly nine years after the Court denied his motion for a certificate of appealability. By any definition of "reasonable," petitioner allowed more than a reasonable amount of time to elapse before filing the instant motion. Accordingly,

IT IS ORDERED that petitioner's motion for relief from judgment is denied.

Dated: November 21, 2018
Detroit, Michigan

s/Bernard A. Friedman
BERNARD A. FRIEDMAN
SENIOR UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on November 21, 2018.

s/Johnetta M. Curry-Williams
Case Manager

**Additional material
from this filing is
available in the
Clerk's Office.**