

APPENDIX A

United States Appeals Court

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Deborah S. Hunt
Clerk

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: April 01, 2020

Mr. Daryl L. Zimmer
Kinross Correctional Facility
4533 W. Industrial Park Drive
Kincheloe, MI 49786

Re: Case No. 19-2265, *In re: Daryl Zimmer*
Originating Case No.: 1:19-cv-12462

Dear Mr. Zimmer,

The Court issued the enclosed Order today in this case.

Sincerely,

s/Antoinette Macon
Case Manager
Direct Dial No. 513-564-7015

cc: Ms. Andrea M. Christensen-Brown
Mr. David J. Weaver

Enclosure

No mandate to issue

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

<p>FILED Apr 01, 2020 DEBORAH S. HUNT, Clerk</p>

In re: DARYL L. ZIMMER,

Movant.

)))))))
ORDER

Before: MOORE, GILMAN, and ROGERS, Circuit Judges.

Daryl L. Zimmer, a Michigan prisoner proceeding pro se, moves for an order authorizing the district court to consider a second or successive application for a writ of habeas corpus under 28 U.S.C § 2254. *See* 28 U.S.C. § 2244(b)(3)(A).

In 2011, Zimmer pleaded guilty to one count of first-degree criminal sexual conduct, one count of second-degree criminal sexual conduct, twelve counts of third-degree criminal sexual conduct, two counts of fourth-degree criminal sexual conduct, two counts of accosting a child for immoral purposes, one count of distributing obscene material to a minor, one count of child sexually abusive activity, and one count of distributing alcohol to a minor. The district court sentenced Zimmer to a total term of twenty-five to seventy-five years of imprisonment. Zimmer later filed a motion to withdraw his guilty plea, which the trial court denied. The Michigan Court of Appeals and the Michigan Supreme Court denied Zimmer's motions for leave to file delayed appeals. In 2013, Zimmer filed a § 2254 petition raising three grounds for relief. The district court denied the petition, finding that Zimmer's claims were either meritless or not cognizable on federal habeas review. This court denied Zimmer's application for a certificate of appealability. *Zimmer v. Rapelje*, No. 15-1186, slip op. at 5 (6th Cir. Dec. 18, 2015) (order).

In 2019, Zimmer filed another habeas petition, which the district court transferred to this court as second or successive. *See In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997) (per curiam).

Zimmer has since filed a corrected motion for authorization to file a second or successive habeas petition, in which he states that he wishes to raise the following grounds for relief: (1) the trial court breached his plea agreement, violated the Ex Post Facto Clause, and infringed on his rights to due process and equal protection under the laws when it imposed an upward departure at sentencing; (2) trial counsel performed ineffectively by failing to object to his sentence properly; and (3) appellate counsel performed ineffectively by failing to argue that the trial court breached his plea agreement at sentencing.

The filing of a second or successive habeas petition raising new grounds for relief is authorized only if the petition “makes a prima facie showing” that it contains a claim premised on: (1) “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable”; or (2) newly discovered facts, which, “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.” 28 U.S.C. § 2244(b)(2)(A)-(B), (b)(3)(C).

Zimmer has not made the requisite prima facie showing. He concedes that his claims do not rely on a new rule of constitutional law or newly discovered evidence. Indeed, Zimmer cites no caselaw in support of his proposed claims, nor does he identify any newly discovered evidence of his actual innocence.

Accordingly, we **DENY** Zimmer’s motion for authorization to file a second or successive habeas petition.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", is written over a horizontal line.

Deborah S. Hunt, Clerk

APPENDIX B

United States Eastern District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

DARYL L. ZIMMER,

Petitioner,

Case Number 19-12462

v.

Honorable Thomas L. Ludington
Magistrate Judge Patricia T. Morris

JACK KOWALSKI,

Respondent.

**OPINION AND ORDER TRANSFERRING SUCCESSIVE PETITION FOR
A WRIT OF HABEAS CORPUS TO UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT AND DENYING THE MOTION FOR
THE APPOINTMENT OF COUNSEL**

Petitioner, Daryl L. Zimmer, confined at the Kinross Correctional Facility in Kincheloe, Michigan, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2011 plea convictions out of the St. Clair County Circuit Court for one count of first-degree criminal sexual conduct, one count of second-degree criminal sexual conduct, twelve counts of third-degree criminal sexual conduct, two counts of fourth-degree criminal sexual conduct, two counts of accosting a child for immoral purposes, one count of distributing obscene material to a minor, one count of child sexually abusive activity, and one count of distributing alcohol to a minor. The first two counts of first-degree criminal sexual conduct occurring in 2010-2011, and two additional counts of third-degree criminal sexual conduct were dismissed. Petitioner was then sentenced to 25 to 75 years for the first-degree criminal sexual conduct conviction, 10 to 15 years for each of the second and third-degree criminal sexual conduct convictions, 13 to 20 years for child sexually abusive activity conviction, 2 to 4 years for each of the accosting a child for immoral purposes convictions, 1 to 2 years for the fourth-degree criminal

sexual conduct and distributing obscene materials convictions, and 90 days (with credit for time served) for the distributing alcohol to a minor conviction.

The present petition constitutes a “second or successive petition” within the meaning of 28 U.S.C. § 2244(b)(3), again challenging the above convictions. The Court transfers the matter to the Court of Appeals so that petitioner may obtain permission to proceed. The motion for the appointment of counsel is denied without prejudice.

I.

Petitioner previously filed a petition for a writ of habeas corpus challenging his convictions, which was denied. *Zimmer v. Rapelje*, No. 2:13-CV-12560, 2015 WL 348744 (E.D. Mich. Jan. 26, 2015); *app. Dism.* No. 15-1186 (6th Cir. Dec. 18, 2015).

II

A prisoner who wishes to file a second or successive habeas petition must first ask the court of appeals for an order authorizing the district court to adjudicate the petition. *See* 28 U.S.C. § 2244(b)(3)(A); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 641 (1998). When a habeas petitioner files a second or successive petition for habeas corpus relief in the district court without first obtaining permission to do so from the court of appeals, the district court must transfer the petition to the Court of Appeals pursuant to 28 U.S.C. § 1631. *See In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997).

The Court will likewise deny petitioner’s motion for the appointment of counsel, because this Court lacks jurisdiction over his successive petition in the absence of authorization from the Sixth Circuit pursuant to 28 U.S.C. 28 § 2244(b)(3)(A). *See e.g., U.S. v. Key*, 205 F.3d 773, 774 (5th Cir. 2000) (district court lacked jurisdiction over petitioner’s motion for the appointment of counsel to assist in his filing of a successive habeas corpus petition, and, instead, the motion for

the appointment of counsel should have been brought in Court of Appeals as part of a petition for authorization to file a successive habeas petition).

Accordingly, the Clerk of Court is **ORDERED** to transfer the habeas petition to the United States Court of Appeals for the Sixth Circuit pursuant to *Sims* and 28 U.S.C. § 1631. *See Galka v. Caruso*, 599 F. Supp. 2d 854, 857 (E.D. Mich. 2009).

It is further **ORDERED** that the motion for the appointment of counsel is **DENIED WITHOUT PREJUDICE**.

Dated: October 25, 2019

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon **Daryl L. Zimmer** #814913, KINROSS CORRECTIONAL FACILITY, 4533 W. Industrial Park Drive, KINCHELOE, MI 49786 by first class U.S. mail on October 25, 2019.

s/Kelly Winslow
KELLY WINSLOW, Case Manager

APPENDIX C

Notice of Transfer and Bond Motion

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Deborah S. Hunt
Clerk

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: April 14, 2020

Mr. Daryl L. Zimmer
Kinross Correctional Facility
4533 W. Industrial Park Drive
Kincheloe, MI 49786

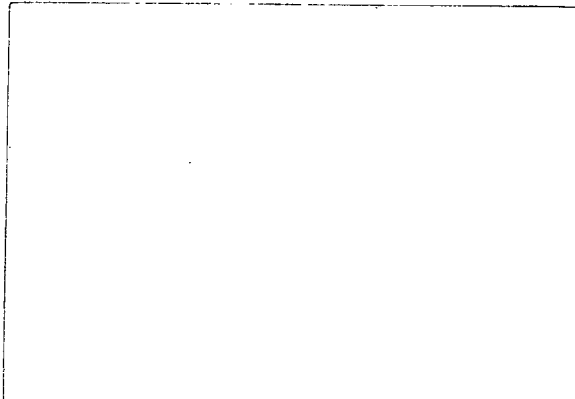
Re: Case No. 19-2265, *In re: Daryl Zimmer*
Originating Case No.: 1:19-cv-12462

Dear Mr. Zimmer,

The court received your letter regarding the Motion for Release or to Set Appeal Bond. The District Court filed an order on October 25, 2019 to transfer your habeas petition to the United States Court of Appeals for the Sixth Circuit. You mailed a Motion for Release on Personal Recognizance or Set a Fair Appeal Bond to the District Court, that was filed on November 1, 2019. The Appeals Court did not receive that motion. You will need to contact the Eastern District Court of Michigan to receive information and request copies of that motion.

Sincerely,

s/Antoinette Macon
Case Manager
Direct Dial No. 513-564-7015



APPENDIX D

Civil docket for Petitioner's Habeas Corpus

U.S. District Court
Eastern District of Michigan (Bay City)
CIVIL DOCKET FOR CASE #: 1:19-cv-12462-TLL-DRG

Zimmer v. Kowalski
Assigned to: District Judge Thomas L. Ludington
Referred to: Magistrate Judge David R. Grand
Cause: No cause code entered

Date Filed: 08/21/2019
Date Terminated: 10/25/2019
Jury Demand: None
Nature of Suit: 530 Habeas Corpus
(General)
Jurisdiction: Federal Question

Petitioner**Daryl L. Zimmer**

represented by **Daryl L. Zimmer**
814913
KINROSS CORRECTIONAL
FACILITY
4533 W. Industrial Park Drive
KINCHELOE, MI 49786
PRO SE

V.

Respondent

Jack Kowalski
Warden

Date Filed	#	Docket Text
08/21/2019	<u>1</u>	PETITION for Writ of Habeas Corpus filed by Daryl L. Zimmer against Jack Kowalski. (LGra) (Entered: 08/23/2019)
08/21/2019	<u>2</u>	Prisoner Trust Fund Account Statement by Daryl L. Zimmer (LGra) (Entered: 08/23/2019)
08/21/2019	<u>3</u>	MOTION for Leave to Proceed In Forma Pauperis re <u>1</u> Petition for Writ of Habeas Corpus by Daryl L. Zimmer. (LGra) (Entered: 08/23/2019)
08/21/2019	<u>4</u>	MOTION to Appoint Counsel by Daryl L. Zimmer. (LGra) (Entered: 08/23/2019)
08/26/2019	<u>5</u>	Notice Regarding Parties' Responsibility to Notify Court of Address Changes (KCAs) (Entered: 08/26/2019)
09/06/2019	<u>6</u>	NOTICE of Change of Address/Contact Information by Daryl L. Zimmer. (DPer) (Entered: 09/09/2019)
09/09/2019	<u>7</u>	ORDER granting <u>3</u> Motion to Proceed In Forma Pauperis. Signed by

		Magistrate Judge R. Steven Whalen. (AFla) Modified on 9/9/2019 (AFla). (Entered: 09/09/2019)
10/25/2019	<u>8</u>	OPINION AND ORDER TRANSFERRING SUCCESSIVE PETITION FOR A WRIT OF HABEAS CORPUS TO UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND DENYING THE MOTION FOR THE APPOINTMENT OF COUNSEL. - Signed by District Judge Thomas L. Ludington. (SOso) (Entered: 10/25/2019)
11/01/2019	8 <u>9</u>	MOTION for Release on Personal Recognizance or set a Fair Appeal Bond by Daryl L. Zimmer. (NAhm) (Entered: 11/04/2019)
04/02/2020	<u>10</u>	ORDER from U.S. Court of Appeals - Sixth Circuit [Appeal Case Number 19-2265] (SKra) (Entered: 04/02/2020)

APPENDIX E

Letter from Deputy Clerk of Appeals Court

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

DEBORAH S. HUNT
CLERK

TELEPHONE
(513) 564-7000

May 6, 2020

Mr. Daryl L. Zimmer
Kinross Correctional Facility
4533 W. Industrial Park Drive
Kincheloe, MI 49786

Re: Case No. 19-2265, *In re: Daryl Zimmer*
Originating Case No.: 1:19-cv-12462

Dear Mr. Zimmer,

The Clerk's Office for the U.S. Court of Appeals for the Sixth Circuit is in receipt of your papers titled "Petitioner Daryl L. Zimmer Motion for Release on Personal Recognizance or Set a Fair Appeal Bond." This motion was directed to the U.S. District Court for the Eastern District of Michigan and a review of the district court's electronic case docket indicates your motion was filed in that court on November 1, 2019. As previously indicated in a clerk's letter of April 14, 2020, you will need to contact the Eastern District Court of Michigan Clerk's Office for information regarding your motion filed in that court.

By Order dated April 1, 2020, this Court denied your motion for authorization to file a second or successive habeas petition and your appellate case is closed. Accordingly, your papers are returned unfiled and without ruling.

Sincerely,
/s/ Julie Cobble
Chief Deputy Clerk

Enclosure

APPENDIX F

Letter to the U.S. District Court concerning
Petitioner's unanswered appeal bond and
appointment of counsel Motions

APPENDIX F

Letter to the U.S. District Court concerning
Petitioner's unanswered appeal bond and
appointment of counsel Motions

May 13, 2020

United States District Court
Office of the Clerk
Theodore Levin U.S. Courthouse
231 W. Lafayette Boulevard
Detroit, Michigan, 48226

RE: Daryl Zimmer v. Warden,
Case No. 1:19-cv-12462
HON. Thomas L. Ludington

Dear Clerk:

Hi! On April 14, 2020, case manager Antoinette Macon of the Sixth Circuit U.S. Court of Appeals told me to write you concerning my appeal bond Motion I filed in your Court on November 1, 2019. There was no ruling on my said Motion. Antoinette Macon suggested that I write you, inquiring what happened in regards to my Motion, as well as my Motion for the appointment of counsel.

Please see what happened to my motions and get back with me as soon as you are able to.

Sincerely,

Daryl L. Zimmer
Mr. Daryl L. Zimmer #814913
Kinross Correctional Facility
4533 W. Industrial Park Drive
Kincheloa, Michigan, 49788

File:

Appendix G

District Court Order Granting Petition to
Proceed In Forma Pauperis

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

DARYL L. ZIMER, 814913,

Petitioner,

v.

JACK KOWALSKI,

Respondent(s).

Case No. 19-12462

Judge Thomas L. Ludington

Magistrate Judge David R. Grand

ORDER GRANTING PETITION TO PROCEED IN FORMA PAUPERIS

The Court has reviewed the petition to proceed in forma pauperis, the affidavit in support, and the financial status communication;

IT IS ORDERED that the petition to proceed in forma pauperis is GRANTED.

Date: September 9, 2019

s/R. Steven Whalen

R. Steven Whalen

United States Magistrate Judge

Certificate of Service

I hereby certify that a copy of the foregoing document was served upon Petitioner on the date indicated below by first class mail.

Date: September 9, 2019

s/A. Flanigan

Deputy Clerk