

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR J. ROUSE, et al.,

)

Plaintiffs-Appellants,

)

v.

)

GRETCHEN WHITMER, Michigan Governor, et
al.,

)

Defendants-Appellees.

)

FILED
Sep 30, 2020
DEBORAH S. HUNT, Clerk

ORDER

Before: ROGERS, NALBANDIAN, and MURPHY, Circuit Judges.

This matter is before the court upon initial consideration to determine whether this appeal was taken from an appealable order.

Multiple Michigan prisoners at the Parnall Correctional Facility in Jackson, Michigan, filed a complaint challenging the conditions of their confinement in light of the COVID-19 pandemic and seeking immediate or speedier release from their prison sentences. The district court construed the complaint as a hybrid action asserting constitutional claims under 42 U.S.C. § 1983 and claims for habeas corpus relief under 28 U.S.C. § 2254. The district court dismissed the habeas corpus portion of the plaintiffs' complaint without prejudice because, among other reasons, the plaintiffs had not alleged that they satisfied the exhaustion requirements in § 2254. As to the § 1983 portion of the complaint, the district court directed the plaintiffs to pay the filing fee for a civil action or file the required documents to proceed in forma pauperis. This appeal followed.

This court may exercise jurisdiction only over final orders, 28 U.S.C. § 1291, and certain interlocutory orders and collateral orders, 28 U.S.C. § 1292; *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545–46 (1949); *see also Anderson v. Roberson*, 249 F.3d 539, 542-43 (6th

Cir. 2001). No final order terminating all the issues presented in the litigation has been entered. See *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981); *Bonner v. Perry*, 564 F.3d 424, 426–27 (6th Cir. 2009). The § 1983 claims remain pending in the district court. Moreover, the challenged order is not appealable under § 1292 or the collateral order doctrine. See *Gacho v. Butler*, 792 F.3d 732, 735–36 (7th Cir. 2015) (dismissal of § 2254 claim without prejudice due to failure to exhaust state remedies was not a final, appealable order when refiling wasn't otherwise barred).

Finding no basis for appellate jurisdiction, we **DISMISS** the appeal.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

No. 20-1786

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Dec 07, 2020

DEBORAH S. HUNT, Clerk

ARTHUR J. ROUSE AND CHRISTOPHER SCOTT MERRILL,

Plaintiffs-Appellants,

v.

GRETCHEN WHITMER, MICHIGAN GOVERNOR, ET AL.,

Defendants-Appellees.

O R D E R

BEFORE: ROGERS, NALBANDIAN, and MURPHY, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: December 07, 2020

Mr. Christopher Scott Merrill
Parnell Correctional Facility
1760 E. Parnell
Jackson, MI 49201-0000

Arthur J. Rouse
Parnell Correctional Facility
1760 E. Parnell
Jackson, MI 49201-0000

Re: Case No. 20-1786, *Arthur Rouse, et al v. Gretchen Whitmer, et al*
Originating Case No.: 2:20-cv-11409

Dear Mr. Merrill and Mr. Rouse,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

Enclosure

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ARTHUR J. ROUSE, et al.,

Petitioner,

Case No. 20-cv-11409
Honorable Mark A. Goldsmith

v.

GRETCHEN WHITMER, et al.,

Respondent.

ORDER DISMISSING HABEAS PETITION PORTION OF COMPLAINT AND
DIRECTING PLAINTIFFS TO CORRECT FILING DEFICIENCY

Michigan prisoners Arthur J. Rouse, Bryan Rozengard, Jordan Kelley, Colton Mitchell, Vincent Donald Boose, Kendall Whitgreave, Nicholas D. Lehman, Bradley S. Hunt, Anthony Williams, Calvin Dody, Calvin R. Owens, Corey S. Hernandez, Gary L. Mills, Trenton Lane, Nicholas Vantuyl, George Main, Justin Sloothaak, Donald D. Helton, Jr., Christopher S. Merrill, Devin Martin, Joshua Fields, Tyler Jobson, Rufus Tindall, Steven Austin, Robert Deeton, Dane Iscaro, D. Brown, L. Davis, Willie Frapier, Rex Bartholomew, Ryan Whitman, Allen Creton, Brian Charnesky, Kevin Smith, Ricky Frye, Ronald Howard, Ryan Zerbe, Travis Stone, Keontae Moore, Terry Raymond, Milko Saran, Christian Tovar, Joe Cooper, Kyle McDaniel, Jason Kehoe, Michael Lavanway, Andoshawn Williams, Nicholas Tracey, Kevin Chunko, Kahlil Mavkell, Preston Weaver, John Doe 1-10, and Jane Doe 1-10 ("Plaintiffs") have submitted a joint emergency complaint for temporary restraining order and/or hybrid writ of habeas corpus pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2254. (ECF No. 1.)

In their complaint, Plaintiffs, all incarcerated at the Southern Michigan Temporary Correctional Facility, challenge the conditions of their confinement in light of the COVID-19 pandemic and name Michigan Governor Gretchen Whitmer, Michigan Department of Corrections Director Heidi Washington, Warden Melinda Braman, Deputy Warden Lee McRoberts, and John and Jane Doe as the defendants in this action. Plaintiffs raise thirteen claims for relief. Twelve claims seek relief under 42 U.S.C. § 1983 and the thirteenth claim seeks relief under 28 U.S.C. § 2254.

The Court finds that Plaintiffs' § 2254 claim is not properly joined in this civil rights action. First, a prisoner generally may not file a civil rights action and a petition for habeas corpus relief in the same action because the controlling statutes have different purposes and distinct procedural requirements. See In re Noble, 663 F. App'x 188, 190-91 (3d Cir. 2016) (holding that district court's refusal to allow a hybrid § 1983/§ 2254 action was appropriate because "the difference in filing fees, the distinct statutory schemes implicated by each type of action ... and the dissimilar standards for briefing, screening, and processing of habeas petitions versus civil rights complaints" makes hybrid actions difficult to manage); Mittelstadt v. Wall, No. 14-CV-423-JDP, 2014 WL 5494169, at *2 (W.D. Wis. Oct. 30, 2014) (holding that a prisoner "cannot pursue both habeas and § 1983 claims in a single lawsuit"). Second, Plaintiffs have not alleged that they satisfied § 2254's exhaustion requirement before raising their habeas claim. See Prather v. Rees, 822 F.2d 1418, 1422 (6th Cir. 1987) (holding district court is obligated to review the exhaustion issue sua sponte); Nali v. Phillips, 681 F.3d 837, 852 (6th Cir. 2012) ("The petitioner bears the burden of showing that state court remedies have been exhausted."). For these reasons, the Court will dismiss the habeas petition portion of the pleading without prejudice.

The remaining claims are filed under 42 U.S.C. § 1983. The Court therefore applies the filing requirements applicable to non-habeas civil cases. Plaintiffs have not paid the \$350.00 filing fee and the \$50.00 administrative fee for a civil action in federal court. Rather, they have filed an unsigned motion (ECF No. 2) asking the Court, among other things, to waive the requirements of the Prison Litigation Reform Act ("PLRA"). Plaintiffs, however, are prisoners filing a civil action in federal court and are thus bound by the PLRA. Under the PLRA, prisoners who are indigent are still responsible for payment of the full filing fee, but they may request to proceed without prepaying the fees and costs for a civil action. See 28 U.S.C. § 1915(a), (b). The PLRA does not specify how filing fees are to be assessed when multiple prisoners file a joint complaint, but the United States Court of Appeals for the Sixth Circuit has held that fees and costs should be divided equally among the plaintiffs in such cases. See In Re Prison Litigation Reform Act, 105 F.3d 1131, 1137-1138 (6th Cir. 1997). If a prisoner wishes to proceed without prepayment of the filing fee in a civil action, the prisoner must file an affidavit of indigence and a certified trust account statement for the six months immediately preceding the filing of the complaint. See 28 U.S.C. § 1915(a)(1), (2); see also McGore v. Wrigglesworth, 114 F.3d 601, 605 (6th Cir. 1997), overruled on other grounds, Jones v. Bock, 549 U.S. 199 (2007). Here, Plaintiffs have not paid the fees nor have they filed the required documents to proceed without prepayment of the fees and must correct the deficiency as set forth below.

Accordingly, the Court orders that on or before July 23, 2020, Plaintiffs must each either pay their portion of the \$350.00 filing fee (\$6.86 each) and their portion of the \$50.00 administrative fee (\$0.98 each), or, alternatively, file an affidavit of indigence and a current certification/business manager's account statement and a statement of trust fund account

(or institutional equivalent) for the six-month period immediately preceding the filing of the complaint. Should any Plaintiff fail to either pay their portion of the fees or to file the required documents, the Court must presume that the Plaintiff is not proceeding without prepayment of the fee, assess the fees, and dismiss the Plaintiff from the case for want of prosecution. Id. If a Plaintiff is dismissed under such circumstances, he will not be reinstated even if he subsequently pays the fees. Id. Upon receipt of the fees and/or the completed applications to proceed without prepayment of fees or costs, the Court will conduct an initial review of the complaint to determine whether it should be served upon the defendants or should be fully or partially dismissed under 28 U.S.C. § 1915A(B) or § 1915(e)(2)(B) (which both require the Court to dismiss complaints that are frivolous or malicious, fail to state a claim upon which relief may be granted, or seek monetary relief against a defendant who is immune from such relief).

The Court dismisses the habeas petition portion of Plaintiffs' pleading without prejudice. Any plaintiff who wishes to pursue relief under 28 U.S.C. § 2254 must do so by filing a new petition in accordance with the requirements set forth in Rule 2 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254.

SO ORDERED.

Dated: June 22, 2020
Detroit, Michigan

s/Mark A. Goldsmith
MARK A. GOLDSMITH
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on June 22, 2020.

s/Karri Sandusky
Case Manager