

No. 23-1670

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 16, 2024
KELLY L. STEPHENS, Clerk

In re: DOUGLAS CORNELL JACKSON,)
Petitioner.)
)

ORDER

Before: BUSH, NALBANDIAN, and READLER, Circuit Judges.

Douglas Cornell Jackson petitions this court for a writ of mandamus directing the district court to lift its stay on the adjudication of his 28 U.S.C. § 2254 habeas corpus petition. He also moves to proceed *in forma pauperis*, to supplement his mandamus petition, and to expedite a decision.

“The traditional use of the writ in aid of appellate jurisdiction . . . has been to confine [the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction.” *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004) (alteration in original) (quoting *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 26 (1943)). “[T]he writ is one of the most potent weapons in the judicial arsenal,” and “only exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify [its] invocation.” *Id.* (cleaned up). To preserve its use to only extraordinary causes, a petitioner must satisfy certain conditions, including that he have no adequate alternative means to obtain the relief he seeks and be clearly and indisputably entitled to the writ. *See id.* at 380–81.

Jackson has an adequate alternative to mandamus relief in the form of an appeal from the district court's denial of his motion to lift the stay. Indeed, he has done just that. Further, he has not shown that he is clearly and indisputably entitled to the writ. The district court denied his

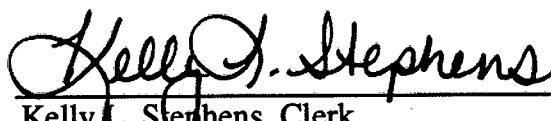
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motion to lift the stay as premature because Jackson still has not exhausted his state-court remedies; the next step appears to be an appeal from the state trial court's denial of relief.

Accordingly, the petition for a writ of mandamus is **DENIED**. The motion to supplement is **GRANTED**, and the motions to expedite and to proceed *in forma pauperis* are **DENIED** as moot.

ENTERED BY ORDER OF THE COURT


Kelly L. Stephens
Kelly L. Stephens, Clerk

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

DOUGLAS JACKSON,

Petitioner,

Case No. 2:15-CV-11622

v.

**UNITED STATES DISTRICT JUDGE
GERSHWIN A. DRAIN**

LES PARISH,

Respondent,

/

**OPINION AND ORDER DENYING AS PREMATURE
THE MOTION TO LIFT THE STAY (ECF No. 158)**

Before the Court is petitioner's motion to lift the stay. For the reasons that follow, the motion is DENIED as premature.

Petitioner filed a petition for writ of habeas corpus with this Court pursuant to 28 U.S.C. § 2254, which was held in abeyance and administratively closed to permit petitioner to complete state post-conviction proceedings in the state courts where he had attempted to exhaust additional claims. *Jackson v. Parish*, No. 15-CV-11622, 2019 WL 4573799 (E.D. Mich. Sept. 20, 2019). The stay was based on the fact that the Michigan Supreme Court remanded petitioner's case back to the Wayne County Circuit Court to address petitioner's motion for reconsideration. The Michigan Supreme Court in a fairly lengthy order required the trial court to determine whether petitioner's amended motion for relief from judgment filed on May 24, 2016

constituted a successive motion for relief from judgment within the meaning of M.C.R. 6.502(G). If the trial judge determined that it was not a successive motion, the judge was directed to decide the motion under the standard for granting or denying post-conviction relief found in M.C.R. 6.508. If the judge determined that this motion is successive, the judge could deny relief pursuant to M.C.R. 6.502(G). The judge was ordered to “issue an opinion setting forth its analysis.” *In re Jackson*, 932 N.W.2d 622 (Mich. 2019).

Petitioner recently moved to lift the stay, on the ground that the Wayne County Circuit Court judge denied his remaining claims pursuant to M.C.R. 6.502(G), apparently finding the amended motion to be a successive motion for relief from judgment. This Court denied the motion as premature because petitioner had yet to exhaust his appellate court remedies. (ECF No. 149).

Petitioner has now filed another motion to lift the stay. Petitioner claims that he attempted to file an application for leave to appeal to the Michigan Court of Appeals but that court denied his motion to waive fees because petitioner failed to provide the court with a certified copy of his prisoner account statement as required by MICH. COMP. LAWS § 600.2963. Petitioner was given 21 days from the date of the order to either provide the Michigan Court of Appeals with his certified prisoner account statement or pay the \$ 375.00 filing fee or his appeal would be dismissed.

See People v. Jackson, No. 367562 (Mich.Ct.App. Oct. 31, 2023)(ECF No. 158,

PageID. 7718). Petitioner claims that it would be futile for him to continue to appeal his post-conviction motion with either the Michigan Court of Appeals or the Michigan Supreme Court because he alleges that prison officials refuse to provide him with a certified copy of his account statement.

Although a futility exception to the exhaustion requirement exists, *see Duckworth v. Serrano*, 454 U.S. 1, 3 (1981), a habeas petitioner is nonetheless required to demonstrate that all available state court remedies have been exhausted or that exceptional circumstances exist which would make exhaustion unnecessary. *Doty v. Lund*, 78 F. Supp. 2d 898, 901 (N.D. Iowa 1999).

Michigan Compiled Laws § 600.2963 requires a prisoner to pay a filing fee in civil actions. The law allows an indigent prisoner the ability to make a partial payment of the filing fee if he or she submits to the court a certified copy of his or her institutional account, showing the current balance in the account and a 12-month history of deposits and withdrawals for the account.

Petitioner has yet to show that it would be futile for him to attempt to fully exhaust his claims.

First, petitioner has provided this Court no proof that he attempted to obtain his prisoner account statement from prison officials or that they have refused to provide him with a copy. Petitioner's conclusory and unsupported allegations that prison officials failed to provide him with a copy of his prisoner trust account

statement are insufficient to excuse the exhaustion of his state court remedies. *Cf. Montana v. Hargett*, 212 F. App'x 770, 772-73 (10th Cir. 2007)(Plaintiff's conclusory and unsupported allegations of wrongdoing by prison officials in failing to provide him with a signed trust fund account statement was insufficient to excuse plaintiff's non-compliance with the federal Prisoner Litigation Reform Act's filing requirements).

More importantly, it is unclear whether MICH. COMP. LAWS § 600.2963 should even be applicable to a post-conviction motion for relief from judgment filed under M.C.R. 6.500, *et. seq.* Michigan Compiled Laws § 600.2963 applies to civil actions. The statute does not define what constitutes a civil action nor does it define whether post-conviction motions for relief from judgment are civil or criminal for purposes of this rule. Michigan Court Rule 6.500, Michigan's rule for post-conviction procedures, falls under Michigan's Rules for Criminal Procedure.

In other contexts, both state and federal cases have indicated that a post-conviction motion for relief from judgment is different than a civil action and various court rules applicable to civil actions are thus inapplicable to 6.500 motions. *See People v. Felder*, No. 357573, 2022 WL 1194680, at * 1, n. 4 (Mich. Ct. App. Apr. 21, 2022)(M.C.R. 2.302(C), the civil rule for discovery, was inapplicable because the defendant was seeking post-conviction relief in a criminal case), *lv. denied*, 979 N.W.2d 855 (Mich. 2022); *Stoll v. Emmet Cir. Ct. Chief Judge*, No. 328998, 2016

WL 6139149, at *2 (Mich. Ct. App. Oct. 20, 2016)(plaintiff could not challenge her conviction through a civil action but only by filing a post-conviction motion for relief from judgment pursuant to M.C.R. 6.500); *Rideaux v. Perry*, No. 16-1458, 2017 WL 3404658, at * 1 (6th Cir. Feb. 27, 2017)(habeas petitioner's motion for an evidentiary hearing that was filed under M.C.R. 2.612(C)(1)(c), did not toll the statute of limitations for habeas petitions under 28 U.S.C. 2244(d)(2) because it was not a properly filed post-conviction motion in that 2.612(C)(1)(c) pertained to relief from judgment in civil actions, not criminal proceedings; petitioner's sole means of challenging his conviction was by filing a post-conviction motion under M.C.R. 6.500).

Moreover, the Michigan Court of Appeals has held, in a related case filed by petitioner, that a portion of MICH. COMP. LAWS § 600.2963 is unconstitutional as applied to civil actions brought by a Michigan prisoner, when that civil action is being used as part of the appellate process for the underlying criminal case. *See In Re Jackson*, 326 Mich. App. 629, 929 N.W.2d 798, 800 (2018). Petitioner had filed a complaint for superintending control against the Wayne County Circuit Court judge, alleging that the judge failed to rule on a motion for reconsideration of an order in petitioner's criminal case. *Id.* at 632. The Michigan Court of Appeals had dismissed the case pursuant to MICH. COMP. LAWS § 600.2963(8) because petitioner owed fees from prior cases. *Id.* The Michigan Supreme Court remanded the case to

the Michigan Court of Appeals to determine the constitutionality of MICH. COMP. LAWS § 600.2963(8). *Id.* at 633. On remand, the Michigan Court of Appeals concluded that although petitioner's complaint for superintending control was a civil action within the meaning of MICH. COMP. LAWS § 600.2963, it would be unconstitutional to apply subsection (8) of the statute to petitioner's complaint for superintending control because petitioner was using the complaint to seek relief in an underlying criminal case by directing the judge to issue an order so that he could appeal her decision to deny his post-conviction motion. *Id.* at 637. Although the Michigan Court of Appeals declined to find the other provisions of MICH. COMP. LAWS § 600.2963 to be unconstitutional, *Id.* at 639-40, an argument nonetheless could be made by petitioner, either on reconsideration with the Michigan Court of Appeals, or in an application for leave to appeal to the Michigan Supreme Court, that the other filing fee provisions of MICH. COMP. LAWS § 600.2963 either are inapplicable to petitioner's post-conviction appeal because it is not a civil action within the meaning of the statute, and/or the statute is unconstitutional as applied against petitioner because he is seeking to challenge his underlying criminal conviction.

Thus, although petitioner claims that it would be futile to exhaust his remedies in state court, petitioner's failure to pursue his claims in state court through to the Michigan Supreme Court "disqualifies his case from consideration under the narrow

exception [to the exhaustion requirement]". *See Dillon v. Hutchinson*, 82 F. App'x 459, 462 (6th Cir. 2003).

Based on the foregoing, the Court denies the motion to lift the stay as premature. Petitioner can move to reopen the petition within sixty days of the conclusion of any post-conviction appeals. Alternatively, if petitioner chooses not to proceed further, but wishes to delete any unexhausted claims, he has sixty days from the date of this order to move to reopen the case and to delete his unexhausted claims.

IT IS HEREBY ORDERED that the motion to lift the stay (ECF No. 158) is DENIED AS PREMATURE.

SO ORDERED.

Dated: February 12, 2024

/s/Gershwin A. Drain
GERSHWIN A. DRAIN
United States District Judge

CERTIFICATE OF SERVICE

Copies of this Order were served upon attorneys of record on February 12, 2024, by electronic and/or ordinary mail.

/s/ Lisa Bartlett
Case Manager