FILED
United States Court of Appeals
Tenth Circuit

September 25, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

GABRIEL DESMOND YANKEY, JR.,

Petitioner - Appellant,

v.

JEFF EASTER,

Respondent - Appellee.

No. 23-3036
(D.C. No. 5:22-CV-03277-JWB)
(D. Kan.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HARTZ**, **BALDOCK**, and **ROSSMAN**, Circuit Judges.

While incarcerated in the Sedgwick County Jail in Kansas, Gabriel Desmond Yankey, Jr. filed in the United States District Court for the District of Kansas a petition for writ of habeas corpus, properly construed by the district court as an application for relief under 28 U.S.C. § 2241. He complained that he had been arrested without a warrant and was being confined without any charges having been filed against him. The court dismissed the application. One ground for the dismissal was that he had failed to exhaust his remedies in state court.

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Despite the dismissal, Mr. Yankey filed a variety of additional pleadings in the case, some captioned as petitions for writs of habeas corpus. In these pleadings he raised an additional ground for relief, contending that the Sedgwick County judges should not be hearing his case because of prejudice against him arising from a separate federal lawsuit that he filed against them. The district court continued to reject his claims until he filed a notice of appeal on March 2, 2023. We construe that notice as challenging all the prior district-court rulings against him.

For this court to have jurisdiction to hear Mr. Yankey's challenges, we must first issue a certificate of appealability (COA). See 28 U.S.C. § 2253(c)(1)(A) ("Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court."); *Miller-El v. Cockrell,* 537 U.S. 322, 335–36 (2003) (COA is "a jurisdictional prerequisite"); *Montez v. McKinna*, 208 F.3d 862, 869 (10th Cir. 2000) ("[T]his court reads § 2253(c)(1)(A) as applying whenever a state prisoner habeas petition relates to matters flowing from a state court detention order. This includes not only challenges to the validity of a state court conviction and sentence under § 2254, but also challenges related to the incidents and circumstances of any detention pursuant to state court process under § 2241."). We deny a COA and therefore dismiss the case for lack of jurisdiction. Because our dismissal is on jurisdictional grounds, we need not address other possible jurisdictional concerns, such as the timeliness of the notice of appeal to challenge the original dismissal by the district court or whether the case is moot. *See Sinochem Intern. Co. Ltd. v. Malaysia Intern. Ship.*

Corp., 549 U.S. 422, 431 (2007) ("[A] federal court has leeway to choose among threshold grounds for denying audience to a case on the merits." (internal quotation marks omitted)); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (although jurisdictional issues "necessarily precede[] a ruling on the merits," that principle "does not dictate a sequencing of jurisdictional issues").

A court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard requires the applicant to show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). When, as here, a district court "denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim," the applicant must make an additional showing: "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Id.*

We deny Mr. Yankey a COA because no reasonable jurist could debate the district court's decision that he failed to exhaust state remedies. "A [state] habeas petitioner seeking relief under 28 U.S.C. § 2241 is generally required to exhaust state remedies," *Wilson v. Jones*, 430 F.3d 1113, 1118 (10th Cir. 2005), and the burden of proving

exhaustion rests with the applicant, *see Olson v. McKune*, 9 F.3d 95, 95 (10th Cir. 1993)**.** "In order to exhaust his state remedies, a federal habeas petitioner must have first fairly presented the substance of his federal habeas claim to state courts." *Hawkins v. Mullin*, 291 F.3d 658, 668 (10th Cir. 2002). "The exhaustion requirement is satisfied if the issues have been properly presented to the highest state court, either by direct review of the conviction or in a postconviction attack," such as a habeas application. *Brown v. Shanks*, 185 F.3d 1122, 1124 (10th Cir. 1999) (internal quotation marks omitted).

Mr. Yankey has not shown that he exhausted state remedies. The record reveals that on September 28, 2022, Mr. Yankey petitioned for a writ of habeas corpus in state district court. The court dismissed the petition on December 19, 2022. But nothing in the record shows that Mr. Yankey appealed that decision. The record also reflects that on February 9, 2023, Mr. Yankey sent the Kansas Court of Appeals a petition for a writ of habeas corpus. But the court refused to file the petition for lack of certification that it had been served on the respondents, and there is no evidence that he later satisfied the Court of Appeals' requirements. Finally, although Mr. Yankey asserts in his appellate brief that he filed a "petition[] for writ of habeas corpus . . . in the supreme court of Kansas," Aplt. Br. at 1, he provides no supporting documentation or other evidence of such filing. In short, Mr. Yankey has not exhausted his state remedies.

To be sure, we have not required exhaustion "when the prisoner has no adequate remedy such that exhaustion would be futile," *Wilson,* 430 F.3d at 1118, and there may be other exceptions to the requirement, *see Ex parte Royall*, 117 U.S. 241, 251–52

(1886). But it is not apparent that such an exception applies here, and Mr. Yankey has not suggested any.

Finally, our analysis is not changed by Mr. Yankey's contention that the state judges should be disqualified from hearing his case because of his prior federal lawsuit against them. He has offered no reason why he could not pursue that contention in the Kansas higher courts—that is, he has not explained why he could not exhaust his state remedies on that issue as well. And we add that on the merits no reasonable jurist would agree with his claim. For one thing, his federal lawsuit was dismissed for failure to state a claim in March 2022. Additionally, "[a] judge is not disqualified merely because a litigant sues or threatens to sue him." *United States v. Grismore*, 564 F.2d 929, 933 (10th Cir. 1977).

We **DENY** Mr. Yankey's request for a COA and dismiss this case. We **GRANT** his motion to proceed in forma pauperis on appeal.

Entered for the Court

Harris L Hartz
Circuit Judge