

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

April 30, 2024

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

In re: JAMES CONWAY,

Petitioner.

No. 24-7023
(D.C. No. 6:22-CV-00004-RAW-DES)
(E.D. Okla.)

ORDER

Before **HARTZ**, **EBEL**, and **KELLY**, Circuit Judges.

James Conway, an Oklahoma prisoner proceeding pro se, petitions this court for a writ of procedendo. We deny the petition for the reasons explained below.

In 2014, Conway pleaded guilty in Oklahoma state court to two counts of first-degree rape. The state court sentenced him to life in prison. Conway did not seek to withdraw his plea or file a direct appeal.

In January 2022, Conway filed a 28 U.S.C. § 2254 petition in the United States District Court for the Eastern District of Oklahoma. Presumably inspired by *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), he argued that his Indian heritage deprived the state court of jurisdiction to convict him for his crimes. The State of Oklahoma moved to dismiss the petition for various reasons, including untimeliness. The district court agreed, dismissed Conway's petition as untimely, and entered final judgment on September 1, 2022. The district court also denied a certificate of appealability (COA).

Conway did not appeal. Rather, he filed a series of six postjudgment motions.

Those motions argued, among other things, that:

- the district court should vacate its timeliness ruling under Federal Rule of Civil Procedure 60(b) because the state court never had jurisdiction over him, meaning (according to Conway) that the state court’s judgment could never become final and the statute of limitations for habeas petitions could never begin to run, *cf.* 28 U.S.C. § 2244(d)(1)(A) (requiring habeas petitions to be brought within one year of “the date on which the [state court] judgment became final”); and
- the district court should issue a writ of prohibition to the state court.

As to each of Conway’s postjudgment motions, the district court construed it as an unauthorized second or successive § 2254 petition, dismissed it for lack of jurisdiction, and denied a COA. The district court entered its most recent order in this regard on January 23, 2024.

On March 21, 2024, this court received from Conway the petition now at issue, in which he requests a writ of procedendo. *Procedendo*, as developed in the English common law system, was a writ from the court of chancery to a subordinate court when the subordinate court “delay[ed] the parties” by failing to “give judgment, either on the one side or the other, when they ought so to do.” 3 William Blackstone, *Commentaries* *109. “In this case a writ of *procedendo* [would] be awarded, commanding [the subordinate court] . . . to proceed to judgment; but without specifying any particular judgment” *Id.* This court has used mandamus (not procedendo) to grant a similar kind of relief when the district court has, for example,

allowed a ripe habeas petition to linger undecided for an unusually long time.

See Johnson v. Rogers, 917 F.2d 1283, 1284–85 (10th Cir. 1990).

In this case, however, the district court has not left Conway’s § 2254 petition undecided, nor any motion. Conway instead argues the district court is unduly delaying its use of Rule 60(b) to vacate its timeliness ruling, and unduly delaying issuance of a writ of prohibition to the state court (he claims that prohibition has no statute of limitations, in contrast to § 2254). In short, he believes the district court incorrectly decided his case.

Conway does not qualify for either mandamus or procedendo. This court’s power to issue such writs comes from 28 U.S.C. § 1651(a), which allows us to “issue all writs necessary or appropriate [1] in aid of their respective jurisdictions and [2] agreeable to the usages and principles of law,” and Conway’s petition fails both conditions. First, in this context, “in aid of their respective jurisdictions” refers to an appellate court’s power to address “exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion.” *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004) (citation and internal quotation marks omitted). But “a court of appeals has no occasion to engage in extraordinary review . . . ‘in aid of its jurisdiction,’ 28 U.S.C. § 1651, when it can exercise the same review by a contemporaneous ordinary appeal.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 8 n.6 (1983) (brackets omitted). Second, using mandamus or procedendo to obtain what is effectively appellate review is not “agreeable” to their

traditional “usages and principles.” *See In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1187 (10th Cir. 2009) (explaining that “a writ [of mandamus] is not a substitute for an appeal,” nor is it “appropriate to issue a writ when the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction” (internal quotation marks omitted)); *In re Ozenne*, 841 F.3d 810, 815 (9th Cir. 2016) (“[A] writ of mandamus cannot substitute for a timely appeal.”); 3 William Blackstone, *Commentaries* *109 (stating that procedendo does not specify the judgment the subordinate court should enter because “that [judgment] (if erroneous) [could] be set aside in the course of appeal”).

We express no opinion on whether Conway could still timely appeal any of the relevant district court orders. We hold only that it would be inappropriate for this court to review those orders by way of an extraordinary writ. We accordingly deny his petition.

We also find that Conway has presented no reasoned, nonfrivolous argument in support of relief in these circumstances, so we deny his motion to proceed without prepayment of costs or fees. *See DeBardleben v. Quinlan*, 937 F.2d 502, 505 (10th Cir. 1991).

Entered for the Court

A handwritten signature in dark ink, appearing to read 'Christopher M. Wolpert', with a long horizontal flourish extending to the right.

CHRISTOPHER M. WOLPERT, Clerk