

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

ANTHONY ALLEN,

Petitioner,
v.

Case No. 1:14-cv-13409
Honorable Thomas L. Ludington

PAUL KLEE,

Respondent.

**OPINION AND ORDER DIRECTING THE CLERK OF THE COURT TO TRANSFER
THE MOTION FOR A CERTIFICATE OF APPEALABILITY AND APPLICATION TO
PROCEED WITHOUT PREPAYING FEES AND COSTS ON APPEAL TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

On October 4, 2016, this Court denied Petitioner's application for a writ of habeas corpus and also denied Petitioner a certificate of appealability or leave to appeal *in forma pauperis*. *Allen v. Klee*, No. 14-cv-13409, 2016 WL 5791189 (E.D. Mich. Oct. 4, 2016). On October 25, 2016, Petitioner filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit. ECF Nos. 16, 17. On the same day, Petitioner filed a motion for a certificate of appealability, ECF No. 15, and a motion to proceed *in forma pauperis*, ECF No. 18. For the following reasons, the Court will order that Petitioner's motion for a certificate of appealability and the application to proceed on appeal without prepaying fees or costs be transferred to the United States Court of Appeals for the Sixth Circuit.

The proper procedure when a district court denies a petitioner a certificate of appealability is for the petitioner to file a motion for a certificate of appealability with the appellate court. This should be done in the appeal from the judgment denying the petition for writ of habeas corpus or the motion to vacate sentence. *See Sims v. U.S.*, 244 F. 3d 509 (6th Cir. 2001) (citing Fed. R.App. P. 22(b)(1)). Petitioner has apparently attempted to follow this

procedure here, but has filed his motion with the district court, rather than the Sixth Circuit. In the interests of justice, this Court will order the Clerk of Court to transfer Petitioner's motion for a certificate of appealability to the United States Court of Appeals for the Sixth Circuit.

The Court will also order the Clerk of the Court to transfer Petitioner's motion to proceed *in forma pauperis* on appeal to the Sixth Circuit. A notice of appeal generally "confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal." *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985) (internal citations omitted); *Workman v. Tate*, 958 F. 2d 164, 167 (6th Cir. 1992). A petitioner's notice of appeal divests the district court of jurisdiction to consider a motion for permission to proceed *in forma pauperis* in the Sixth Circuit Court of Appeals. See *Johnson v. Woods*, No. 5:12-11632; 2013 WL 557271, * 2 (E.D. Mich. February 13, 2013); *Glick v. U.S. Civil Service Com'n*, 567 F. Supp. 1483, 1490 (N.D. Ill. 1983); *Brinton v. Gaffney*, 560 F. Supp. 28, 29-30 (E.D. Pa. 1983).

Because jurisdiction of this action was transferred from the district court to the Sixth Circuit Court of Appeals upon the filing of his notice of appeal, Petitioner's motion to proceed *in forma pauperis* on appeal would be more appropriately addressed to the Sixth Circuit. In the interests of justice, this Court can transfer Petitioner's application to proceed *in forma pauperis* to the Sixth Circuit for that court's consideration. See *Baker v. Perry*, No. 2:12-10424; 2012 WL 6097323, * 2 (E.D. Mich. December 6, 2012).

Accordingly, it is **ORDERED** that the Clerk of the Court is **DIRECTED** to transfer Petitioner Allen's Motion For Certificate of Appealability, ECF No. 15, and Application to Proceed Without Prepaying Fees or Costs on Appeal, ECF No. 18, to the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1631.

Dated: October 27, 2016

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 each attorney or party of record herein by electronic means or first class U.S. mail on October 27, 2016.

s/Michael A. Sian
MICHAEL A. SIAN, Case Manager