

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

JAMES WILLIAM AUSSICKER,

Petitioner,

v.

CASE NO. 2:08-CV-12280

CINDI CURTIN,

Respondent.

**ORDER DENYING PETITIONER'S MOTIONS TO HOLD HABEAS PETITION IN
ABEYANCE, FOR A FRANKS HEARING, FOR AN EVIDENTIARY/SUPPRESSION
HEARING, AND FOR APPOINTMENT OF COUNSEL**

This matter is before the court on Petitioner's motions to hold his petition for a writ of habeas corpus in abeyance, for a Franks hearing, for an evidentiary/suppression hearing, and for appointment of counsel, all of which were filed in May, 2008.

Respondent filed an answer to the petition for habeas corpus on December 3, 2008.

Petitioner filed an amended petition, dated November 28, 2008, on December 8, 2008.

Respondent has not yet filed an answer to the amended petition, nor has Respondent filed a response to Petitioner's motions.

I. DISCUSSION

A. Abeyance

Petitioner seeks to hold his habeas petition in abeyance pending the Michigan Supreme Court's ruling on his application for leave to appeal the lower courts' denial of his motion for relief from judgment. At the time he filed his petition and motion, the Michigan Supreme Court had yet to issue a decision. The Michigan Supreme Court,

however, has since denied Petitioner's leave to appeal. See *People v. Aussicker*, 753 N.W.2d 201 (Mich. July 29, 2008). A stay is therefore unnecessary. Accordingly, the court will deny as moot Petitioner's motion to hold the petition in abeyance.

B. Evidentiary Hearings

Petitioner also asks the court to conduct evidentiary hearings on the validity of his arrest warrant and his Fourth Amendment search and seizure claims. Petitioner's requests for evidentiary hearing are premature. Rule 8 of the Rules Governing 2254 Cases in the United States District Courts states, in pertinent part:

If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required.

Respondent has not yet filed the state court records or an answer to the amended petition and the current deadline for a response is January 29, 2009. Accordingly, the court will deny without prejudice Petitioner's motions for a Franks hearing and for an evidentiary/suppression hearing. If, after reviewing Respondent's answer to the amended petition and the state court record, the court finds that an evidentiary hearing is required, the court will reconsider Petitioner's requests. Petitioner need not file an additional motion regarding these issues.

C. Appointment of Counsel

Finally, Petitioner requests appointment of counsel. Petitioner has no absolute right to be represented by counsel on federal habeas corpus review. See *Abdur-Rahman v. Michigan Dept. of Corrections*, 65 F.3d 489, 492 (6th Cir. 1995); see also *Wright v. West*, 505 U.S. 277, 293 (1992) (citing *Pennsylvania v. Finley*, 481 U.S. 551,

555 (1987)). “[A]ppointment of counsel in a civil case is . . . a matter within the discretion of the court. It is a privilege and not a right.” *Childs v. Pellegrin*, 822 F.2d 1382, 1384 (6th Cir. 1987) (quoting *United States v. Madden*, 352 F.2d 792, 793 (9th Cir. 1965)). Petitioner has submitted his pleadings in support of his claims. Neither an evidentiary hearing nor discovery are necessary at this time, and the interests of justice do not require appointment of counsel. See 18 U.S.C. § 3006A(a)(2)(B); 28 U.S.C. foll. § 2254, Rules 6(a) and 8(c). The court therefore will deny Petitioner’s motion for appointment of counsel.

II. CONCLUSION

IT IS ORDERED that Petitioner’s motion to hold in abeyance the petition [Dkt. # 3] is DENIED AS MOOT.

IT IS FURTHER ORDERED that Petitioner’s motion for a Franks hearing [Dkt. # 4] and motion for an evidentiary/suppression hearing [Dkt. # 5] are DENIED WITHOUT PREJUDICE.

Finally, IT IS ORDERED that Petitioner’s motion for appointment of counsel [Dkt. # 2] is DENIED.

S/Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: January 14, 2009

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, January 14, 2009, by electronic and/or ordinary mail.

S/Lisa Wagner
Case Manager and Deputy Clerk
(313) 234-5522

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