

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

JERMAINE S. EWING,

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Petitioner,

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v.

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No. 4:12CV1201 AGF

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IAN WALLACE,

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Respondent.

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MEMORANDUM AND ORDER

This matter is before the Court upon its own review. Because petitioner has failed to comply with a prior Order of this Court, this action will be dismissed pursuant to Federal Rule of Civil Procedural 41(b).

Background

On July 2, 2012, petitioner filed an application for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Because the petition had not been submitted on a court-form and the manner in which the petition was drafted made it difficult to review, the Court, on July 20, 2012, ordered petitioner to amend his application for habeas corpus on the Court’s form for filing a “Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody.” In that same order,

petitioner was also required to pay the \$5 filing fee or file a motion to proceed in forma pauperis.¹

Rather than file an amended petition in a timely manner, petitioner filed a motion to disqualify the undersigned. On August 13, 2012, the Court denied petitioner's motion to disqualify, finding that petitioner's motion for recusal was not well-taken.² Again, the Court ordered petitioner to amend his application for writ of habeas corpus on a court-provided form, giving him thirty (30) days from the date of that Memorandum and Order to do so.

Discussion

Upon review of the Court file, petitioner has failed to comply with this Court's Memorandum and Order. He has still not filed an amended petition in this action. Instead, petitioner has again moved for "change of judge," and to "admit probative evidence." The Court has reviewed petitioner's arguments for disqualification of the undersigned in this action and has found them frivolous and wholly unsupported. Moreover, petitioner's arguments are nothing more than a

¹Petitioner has since paid the filing fee and filed a motion to proceed in forma pauperis.

²Petitioner requested that the Court recuse herself from this matter because the Court previously denied a prior habeas corpus petition brought by petitioner, in addition to denying his previous request for expansion of the record. See Ewing v. Steele, 4:09CV393 AGF (E.D. Mo.).

request for reconsideration of his earlier motion to disqualify, as such, his motion for change of judge will be denied in accordance with the Court's August 13, 2012 Memorandum and Order.³

Rule 41 of the Federal Rules of Civil Procedure permits the Court to dismiss a case for failure to prosecute or to comply with a Court order. Because petitioner has failed to file an amended application for writ of habeas corpus on a court-form in a timely manner, in accordance with this Court's August 13, 2012 Memorandum and Order, this action will be dismissed.⁴ The Court will further deny petitioner's motion "to admit probative evidence" as moot.

³Additionally, petitioner appears to be requesting reconsideration of the Court's denial of his petition for habeas corpus in his 2009 case before this Court. See Ewing v. Steele, 4:09CV393 AGF (E.D. Mo.). This is neither the proper forum nor the proper vehicle for requesting reconsideration of the denial of his habeas corpus petition.

⁴Even if petitioner had filed an amended petition in a timely manner it is likely his petition would have been dismissed as successive, as petitioner has previously brought an application for writ of habeas corpus on this same conviction in this Court. See Ewing v. Steele, 4:09CV393 AGF (E.D. Mo.). To the extent that petitioner seeks to relitigate claims that he brought in his original petition, those claims would likely be denied pursuant to 28 U.S.C. § 2244(b)(1). To the extent that petitioner seeks to bring new claims for habeas relief, petitioner would have to obtain leave from the United States Court of Appeals for the Eighth Circuit before he could bring those claims in this Court. 28 U.S.C. § 2244(b)(3)(A).

Accordingly,

IT IS HEREBY ORDERED that petitioner's motion for change of judge [Doc. #6] is **DENIED**.

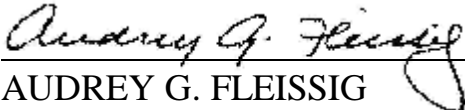
IT IS FURTHER ORDERED that petitioner's motion to proceed in forma pauperis [Doc. #3] is **DENIED AS MOOT** as petitioner has paid the \$5 filing fee.

IT IS FURTHER ORDERED that petitioner's application for writ of habeas corpus is **DISMISSED** without prejudice pursuant to Fed. R. Civ. P. 41(b).

IT IS FURTHER ORDERED that petitioner's motion to admit probative evidence [Doc. #7] is **DENIED AS MOOT**.

A separate Order of Dismissal shall accompany this Memorandum and Order.

Dated this 28th day of September, 2012.



AUDREY G. FLEISSIG
UNITED STATES DISTRICT JUDGE