

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LLOYD T. SCHUENKE,

Petitioner,

v.

JUDY P. SMITH,

Respondent.

ORDER

14-cv-276-jdp

Petitioner Lloyd T. Schuenke is in custody of the Wisconsin Department of Corrections at the Oshkosh Correctional Institution. In an August 26, 2014 order, I dismissed Schuenke's petition for writ of habeas corpus under 28 U.S.C. § 2254 and denied him a certificate of appealability. Dkt. 18. The Court of Appeals for the Seventh Circuit subsequently denied his motion for a certificate of appealability. Dkt. 36. Now petitioner has filed a motion for relief from judgment under Federal Rule of Civil Procedure 60. Dkt. 37. Petitioner has also filed a motion for release from custody pending this court's decision, Dkt. 38, which I will deny as moot.

In his Rule 60 motion, petitioner argues that the court erred by failing to conclude that his 1991 conviction was invalid, which petitioner contends made enhancements to his 2007 and 2008 convictions invalid as well. This is an attack on this court's determination of the merits of his habeas claim, which the United States Supreme Court has ruled cannot be brought in a Rule 60 motion, because it is essentially an attempt at filing a second or successive habeas petition. *Gonzalez v. Crosby*, 545 U.S. 524, 534 (2005) (“[A] Rule 60(b) motion that seeks to revisit the federal court's denial on the merits of a claim for relief should be treated as a successive habeas petition.”). Because I have no authority to consider a second

or successive habeas petition until the Court of Appeals grants me permission to do so, I must deny petitioner's Rule 60 motion. *See Nunez v. United States*, 96 F.3d 990, 991 (7th Cir. 1996) ("A district court must dismiss a second or successive petition, without awaiting any response from the government, unless the court of appeals has given approval for its filing.").

Under Rule 11 of the Rules Governing Section 2254 Cases, I must issue or deny a certificate of appealability when entering a final order adverse to a petitioner. Although the rule allows me to ask the parties to submit arguments on whether a certificate should issue, it is not necessary to do so in this case. Because reasonable jurists would not otherwise debate whether petitioner's motion qualifies as a second or successive petition, I will not issue petitioner a certificate of appealability.

ORDER

IT IS ORDERED that:

1. Petitioner Lloyd T. Schuenke's motion for relief from judgment, Dkt. 37, is DENIED.
2. Petitioner's motion for release from custody pending this court's decision, Dkt. 38, is DENIED as moot.
3. Petitioner is DENIED a certificate of appealability.

Entered June 23, 2016.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge