

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
App. No. 16-2873

In an August 26, 2014 order, I dismissed Lloyd 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. Petitioner then filed a motion for relief from judgment under Federal Rule of Civil Procedure 60, which I denied on June 23, 2016. I also denied petitioner a certificate of appealability. Now petitioner has filed a second notice of appeal in this case. Because plaintiff has not paid the \$505 fee for filing an appeal, I construe his notice as a request for leave to proceed *in forma pauperis* on appeal. The request will be denied because petitioner's appeal is not taken in good faith. 28 U.S.C. § 1915(a)(3).

To find that an appeal is in good faith, a court need find only that a reasonable person could suppose the appeal has some merit. *Walker v. O'Brien*, 216 F.3d 626, 631-32 (7th Cir. 2000). However, I cannot certify that petitioner's appeal is taken in good faith. I denied his Rule 60 motion because petitioners are foreclosed from attacking the court's ruling on the merits of a habeas petition in a Rule 60 motion. *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.”). Having reviewed petitioner’s motion and my order, I am convinced that no reasonable person could suppose that his appeal has some merit.

Because I am certifying petitioner’s appeal as not having been taken in good faith, he cannot proceed with his appeal without prepaying the \$505 filing fee unless the court of appeals gives him permission to do so. Under Fed. R. App. P. 24, petitioner has 30 days from the date of this order in which to ask the court of appeals to review this court’s denial of his request for leave to proceed *in forma pauperis* on appeal. With his motion, he must include an affidavit as described in the first paragraph of Fed. R. App. P. 24(a), with a statement of issues he intends to argue on appeal. Also, he must send along a copy of this order. Petitioner should be aware that he must file these documents in addition to the notice of appeal he has filed previously.

If petitioner does not file a motion requesting review of this order, the court of appeals might not address the denial of leave to proceed *in forma pauperis* on appeal. Instead, it may require petitioner to pay the entire \$505 filing fee before it considers his appeal. If petitioner does not pay the fee within the deadline set, it is possible that the court of appeals will dismiss the appeal.

ORDER

IT IS ORDERED that petitioner Lloyd T. Schuenke’s request leave to proceed *in forma pauperis* on appeal is DENIED because I certify that his appeal is not taken in good faith. If petitioner wishes to appeal this decision, he must follow the procedure set out in

Fed. R. App. P. 24(a)(5). The clerk of court is requested to ensure that petitioner's obligation to pay the \$505 filing fee for the appeal is reflected in this court's financial records.

Entered this 5th day of August, 2016.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge