

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

ROY MITCHELL,

Petitioner,

v.

WILLIAM E. HANRAHAN,

Respondent.

ORDER

16-cv-556-wmc
Appeal No. 17-2996

Petitioner Roy Mitchell, a transgender woman, filed this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging the validity of her sentence imposed upon her in Dane County Case Number 2009CF001876. On September 21, 2017, this court entered an order denying Mitchell's petition as untimely and dismissing this matter. Judgment was entered on that same day. Mitchell has now filed a notice of appeal to the court of appeals from the September 21 order (dkt. #22) and requests leave to proceed without prepayment of the appellate docketing fee (dkt. #23). A district court has the authority to deny such a motion for one or more of the following reasons: the litigant wishing to take an appeal has not established indigence; the appeal is not taken in good faith; or the litigant is a prisoner and has three strikes. 28 U.S.C. § 1915(a)(1), (a)(3) and (g); *see also Sperow v. Melvin*, 153 F.3d 780, 781 (7th Cir. 1998).

Here, the court denied Mitchell's petition as untimely. Before doing so, the court gave her the opportunity to explain that it was timely, and she failed to make any showing that would suggest that her claim was actually timely or that the doctrine of equitable estoppel applied to toll the one-year statute of limitations. On this record, the court cannot certify Mitchell's appeal is taken in good faith.

Because the court is certifying Mitchell's appeal as not taken in good faith, she cannot proceed with her appeal without prepaying the \$505 filing fee, unless the court of appeals gives her permission to do so. Under Federal Rule of Appellate Procedure 24, Mitchell has 30 days from the date of this order in which to ask the court of appeals to review the denial of leave to proceed *in forma pauperis* on appeal. With such a motion, she would need to include an affidavit as described in the first paragraph of Federal Rule of Appellate Procedure 24(a), with a statement of issues she intends to argue on appeal. Also, she must submit a copy of this order.

Mitchell should be aware that she must file these documents in addition to the notice of appeal she has filed previously. If she does not file a motion requesting review of this order, the Court of Appeals may choose not to address the denial of leave to proceed *in forma pauperis* at all. Instead, that court may require her to pay the entire \$505 filing fee before it considers her appeal. **If her fees are not waived and she 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:

1. The court CERTIFIES that petitioner Roy Mitchell's appeal is not taken in good faith for purposes of Federal Rule of Appellate Procedure 24(a)(3).
2. Mitchell's motion for leave to proceed *in forma pauperis* on appeal (dkt. #23) is DENIED.

3. Although this court has certified that Mitchell's appeal is not taken in good faith under Fed. R. App. P. 24(a)(3), **Mitchell is advised that she may challenge this finding pursuant to Federal Rule of Appellate Procedure 24(a)(5) by filing a separate motion to proceed *in forma pauperis* on appeal with the Clerk of Court, United States Court of Appeals for the Seventh Circuit, within thirty (30) days of the date of this order.** With that motion, she must include an affidavit as described in the first paragraph of Fed. R. App. P. 24(a), along with a statement of issues she intends to argue on appeal. Also, she must submit a copy of this order. Mitchell should be aware that she must file these documents in addition to the notice of appeal she has filed previously.

Entered this 2nd day of October, 2017.

BY THE COURT:

WILLIAM M. CONLEY
District Judge