

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

JAMES LEE DOYLE,

Petitioner,

v.

JUDY SMITH, Warden,
Oshkosh Correctional Institution,

Respondent.

ORDER

09-cv-57-bbc

Petitioner James Lee Doyle, a prisoner at the Oshkosh Correctional Institution, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He requests leave to proceed *in forma pauperis*. Petitioner has supported his request with an affidavit of indigency and a six-month trust account statement from the institution.

As an initial matter, I note that petitioner named the State of Wisconsin Circuit Court for Racine County as respondent to the petition. In a habeas action filed by a state prisoner, the proper respondent is the state officer having custody of the prisoner. Rule 2 of the Rules Governing Section 2254 Cases. That person is the warden of the Oshkosh Correctional Institution, Judy Smith. I have revised the caption to show as petitioner's custodian and the respondent and direct the clerk of court to do the same.

In determining whether to allow a prisoner to proceed *in forma pauperis*, this court uses the following formula. First, the court determines petitioner's average monthly deposits and his average monthly balances for the six-month period mentioned above. If 20% of the greater of these two figures is \$5 or more, the petitioner is not eligible for indigent status and will have to

prepay all of the \$5 filing fee. If 20% of the greater of these two figures is less than \$5, he will be required to prepay whatever portion less than \$5 has been calculated.

Applying this formula to petitioner, I find that he is able to pay the \$5 filing fee. According to the trust account statement, in the past six months petitioner's monthly deposits have averaged \$91.50. Petitioner avers that 15% of this income is automatically deposited into his release account, which he does not have access to. However, even if that is the case, that leaves petitioner with an average monthly deposit of \$77.77. Twenty percent of this figure is \$15.55. Accordingly, I will deny petitioner's application for leave to proceed *in forma pauperis*. To proceed further on his habeas petition, petitioner must pay the \$5 filing fee. If he fails to pay the fee by February 23, 2009, his petition will be dismissed for his failure to prosecute it.

ORDER

IT IS ORDERED that the petition of James Lee Doyle for leave to proceed *in forma pauperis* is DENIED. Petitioner has until February 23, 2009 in which to pay the \$5 filing fee. If he fails to submit the fee by that date, his petition will be dismissed for failure to prosecute it.

Entered this 5th day of February, 2009.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge