

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

WUA XIONG,

Petitioner,

v.

WARDEN DITTMAN,

Respondent.

ORDER

12-cv-901-bbc

Judgment was entered on August 26, 2013, denying Wua Xiong's petition for a writ of habeas corpus under 28 U.S.C. § 2254 as untimely. On September 18, 2013, I denied petitioner's motion for a certificate of appealability. Now, petitioner has filed a notice of appeal. Petitioner has also filed a request to proceed in forma pauperis on appeal.

Petitioner's appeal is not subject to the 1996 Prison Litigation Reform Act. Walker v. O'Brien, 216 F.3d 626, 628-629 (7th Cir. 2000) ("the PLRA does not apply to any requests for collateral relief under 28 U.S.C. §§ 2241, 2254, or 2255"). Nevertheless, in determining whether a petitioner is eligible for indigent status on appeal under 28 U.S.C. § 1915, the court must find both that the petitioner does not have the means to pay the \$455 fee for filing his appeal and that the appeal is taken in good faith. 28 U.S.C. § 1915(a)(1) and (3). I conclude that 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, 216 F.3d at 631-32. Petitioner is unable to meet this standard. With respect to this court's August 23, 2013 order denying his petition for writ of habeas corpus as untimely, petitioner cannot show that he is entitled to file his petition after the one-year period from the date his conviction became final. Nor has petitioner raised a persuasive argument showing that the September 18 decision denying him a certificate of appealability was incorrect. Accordingly, petitioner's request to proceed in forma pauperis on appeal will be denied.

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 leave to proceed in forma pauperis on appeal. His motion must be accompanied by an affidavit as described in the first paragraph of Fed. R. App. P. 24(a), including a statement of issues that petitioner intends to present on appeal. Also, petitioner's motion must be accompanied by a copy of this order. Petitioner should be aware that these documents should be filed in addition to the notice of appeal he has previously filed. If petitioner does not file a motion requesting review of this order, it is likely that the court of appeals will not address this court's denial of leave to proceed in forma pauperis on appeal. Instead, it will require petitioner to pay the entire \$455 filing fee before it considers his appeal. If petitioner fails to pay the fee within the deadline set, it is possible that the court of appeals will dismiss the appeal.

Petitioner has also filed a motion for enlargement of time to file a notice of appeal. Under Fed. R. App. P. 4(a)(5), a district court may extend the time to file a notice of appeal

if the party seeking to appeal files a request for an extension within 30 days after the time for filing the appeal has expired and that party shows excusable neglect or good cause. Petitioner's notice of appeal was received by the court on September 30, 2013, four days after the 30-day time to appeal the court's August 26 judgment closing this case. However, petitioner does not provide information to explain why his notice of appeal was received four days after the time for filing his appeal expired, except to state that mailing through the prison system caused delays. If petitioner had shown that he placed the appeal in the prison mail stream before his deadline, the appeal would be considered timely under the prison "mailbox rule," Houston v. Lack, 487 U.S. 266, 275 (1988) and he would not even need to show excusable neglect. Petitioner has not made a showing that he presented the appeal for mailing before his deadline ran out and does not describe with any specificity what delays he encountered. His vague statement is not sufficient to show excusable neglect or good cause, and so his motion for enlargement of time to file his notice of appeal will be denied.

ORDER

IT IS ORDERED that

1. Petitioner Wua Xiong's request for leave to proceed in forma pauperis on appeal, dkt. #18, is DENIED. I certify that petitioner's appeal is not taken in good faith. The clerk of court is directed to insure that petitioner's obligation to pay the \$455 fee for filing his appeal is reflected in the court's financial record.

2. Petitioner's motion for enlargement of time, dkt. #19 to file his appeal is DENIED.

Entered this 15th day of October, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge