

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

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UNITED STATES OF AMERICA,

ORDER

Plaintiff,

04-cr-140-bbc  
13-cv-509-bbc

v.

KEITH A. POPHAL,

Defendant.  
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On July 18, 2013, defendant filed a post conviction motion under 28 U.S.C. § 2255, alleging that his 2005 conviction for being a felon in possession of firearms can no longer stand in light of two recent decisions by the United States Supreme Court in Alleyne v. United States, 133 S. Ct. 2151 (2013), and Descamps v. United States, 133 S. Ct. 2276 (2013). Because defendant had previously filed a § 2255 motion, I denied his motion for lack of jurisdiction on July 22, 2013. On July 31, 2013, defendant filed a motion for reconsideration. That motion was denied on August 12, 2013.

Defendant has now filed a notice of appeal and request for certificate of appealability. His appeal was not accompanied by the \$455 fee that is required if he is to take an appeal from the denial of a § 2255 motion. 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22. Therefore, I will construe defendant's notice as including a request for leave to proceed in forma pauperis on appeal under 28 U.S.C. § 1915.

According to 28 U.S.C. § 1915(a), a defendant who is found eligible for court-appointed counsel in the district court proceedings may proceed on appeal in forma pauperis without further authorization “unless the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed.” I do not need to decide whether defendant is indigent because I am certifying that the appeal is not taken in good faith. In this case a reasonable person could not suppose that the appeal has some merit, as is required in order for the appeal to be taken in good faith.

The law is clear on the subject of successive appeals. It is not debatable that defendant is prohibited from filing a second motion to vacate his sentence under 28 U.S.C. § 2255, without obtaining advance permission to do so from the court of appeals. Therefore, I will deny defendant’s request to proceed in forma pauperis on appeal

Because I denied defendant’s motion for lack of jurisdiction, I did not think it appropriate to take further action on the motion so I did not address the issuance of a certificate of appealability in the July 22, 2013 order. If such a determination is required, I would not grant a certificate because defendant has not made a substantial showing of a denial of a constitutional right.

ORDER

Defendant Keith Pophal's motion to proceed in forma pauperis on appeal and request for certificate of appealability are DENIED.

Entered this 13th day of August, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge