

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

ROBERT NELSON HOWELL,

Petitioner,

v.

JOSEPH SCIBANA, Warden,
Federal Correctional Institution,

Respondent.

ORDER

04-C-27-C

Petitioner has filed a notice of appeal from the judgment of dismissal entered in this action on January 30, 2004, and this court's February 9, 2004 order denying his motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59. The notice is accompanied by a petition and affidavit for leave to proceed in forma pauperis. I conclude that petitioner is not entitled to proceed in forma pauperis on appeal because his appeal is not taken in good faith.

In his Rule 59 motion, petitioner argued that this court erred in holding that his petition, which was styled as a petition for a writ of habeas corpus under 28 U.S.C. § 2241, raised matters that could be heard only in his sentencing court on a motion pursuant to 28

U.S.C. § 2255. After reviewing his pleading a second time, I rejected petitioner's argument that he was deprived of an adequate or effective means of testing the legality of his detention because his sentencing court and the Court of Appeals for the Seventh Circuit had denied him relief on his § 255 motion. In support of his appeal, petitioner does not assert that this court erred in interpreting the allegations of his petition as challenging the validity of his conviction. Rather, he appears to want an opinion from the court of appeals whether it was error for this court to refuse to consider his challenge despite the lack of jurisdiction to do so. Although I understand petitioner's frustration at being jurisdictionally barred from raising his challenge here, particularly in view of the fact that he already has been unsuccessful in obtaining a favorable ruling on his § 2255 motion in the sentencing court and in the court of appeals, there is no legal merit to the claim he wishes to raise on appeal. Therefore, his request for leave to proceed in forma pauperis on appeal will be denied.

If petitioner intends to challenge this court's certification that his appeal is not taken in good faith, he has 30 days from the date he receives this order in which to file with the court of appeals a motion for leave to proceed in forma pauperis on appeal. His motion must be accompanied by a copy of the affidavit prescribed in the first paragraph of Fed. R. App. P. 24(a) and a copy of this order.

ORDER

IT IS ORDERED that petitioner's request for leave to proceed in forma pauperis on appeal is DENIED and I certify that petitioner's appeal is not taken in good faith.

Entered this 9th day of March, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge