

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

TIMOTHY SMITH,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

OPINION AND
ORDER

05-C-653-C

Timothy Smith has filed a document titled “Motion to Renew an Application for a Preliminary Injunction/Temporary Restraining Order.” His motion refers to a motion for a preliminary injunction or temporary restraining order that he filed in connection with a petition for a writ of habeas corpus that he filed on November 10, 2005. After reviewing the habeas petition preliminarily, I entered judgment dismissing the petition with prejudice because I concluded that petitioner was not entitled to federal habeas relief on any of his claims. Petitioner then filed a motion for reconsideration and a motion for a preliminary injunction or temporary restraining order. In an order entered December 14, 2005, I denied the motion for reconsideration on the merits and the motion for a temporary restraining order or preliminary injunction as moot.

Petitioner filed a notice of appeal on January 17, 2006. The Court of Appeals for the Seventh Circuit dismissed the appeal for lack of jurisdiction because petitioner had not filed

it within the 30-day time period prescribed by Rule 4(a) of the Federal Rules of Appellate Procedure and this court had not granted an extension of the appeal period under Rule 4(a)(5).

Petitioner is now back in this court seeking relief on the same grounds he asserted the first time. By petitioner's admission, the only fact that has changed since he first filed his federal habeas petition and accompanying motion for equitable relief is that his appeal has been dismissed by the court of appeals. However, the fact that the court of appeals has dismissed his appeal as untimely does not give petitioner the authority to "renew" his action in this court. If that were the case, then a case in which a party failed to file his appeal on time would never be final. If petitioner is unhappy with the conclusion reached by the court of appeals, then he must appeal to the next highest court, which is the United States Supreme Court. He cannot simply "start over" in this court.

To the extent that petitioner's submissions can be construed as a motion for an extension of the time for filing an appeal of this court's order of December 14, 2005, the motion must be denied. Under Fed. R. App. P. 4(a)(5), this court may grant such an extension only if the movant asks for it no later than 30 days after the time prescribed for taking an appeal has expired. Petitioner's time for appealing this court's order expired on January 13, 2006. Because more than 30 days have elapsed since then, I cannot grant the motion.

Similarly, to the extent that petitioner's motion can be construed as a motion to reopen the judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, that motion must also be denied. A court addressing a Rule 60(b) motion seeking reconsideration of the dismissal of a habeas petition must first determine whether it has jurisdiction to entertain the motion. Under certain circumstances, a Rule 60(b) motion must be treated as a second or successive habeas petition pursuant to 28 U.S.C. § 2244(b); otherwise, the limitations established by the Antiterrorism and Effective Death Penalty Act (AEDPA) on collateral attacks would be rendered naught. Dunlap v. Litscher, 301 F.3d 873, 875 (7th Cir. 2002) (collecting cases); Harris v. Cotton, 296 F.3d 578, 579-80 (7th Cir. 2002) ("Prisoners are not allowed to avoid the restrictions that Congress has placed on collateral attacks on their convictions . . . by styling their collateral attacks as motions for reconsideration under Rule 60(b).") (citations omitted). If a Rule 60(b) motion is in effect a second or successive petition, a district court lacks jurisdiction to consider it unless the court of appeals has granted the petitioner permission to file such a petition. 28 U.S.C. § 2244(b)(3); Nunez v. United States, 96 F.3d 990, 991 (7th Cir. 1996).

The United States Supreme court has held that a Rule 60(b) motion does not conflict with the AEDPA if it attacks "some defect in the integrity of the federal habeas proceedings," rather than challenging the validity of the conviction. Gonzalez v. Crosby, 125 S. Ct. 2641, 2648 (2005). Petitioner's motion is not such an attack. In his motion, petitioner asks this court to "supply facts" in support of its conclusion that his various claims either failed to

state a federal claim or were without merit. Although petitioner's motion purports to be procedural in nature, it actually is another attempt by petitioner to litigate the same issues he raised previously. Accordingly, it is a successive petition over which this court lacks jurisdiction. In order to file such a petition, petitioner must first obtain permission from the court of appeals as provided by 28 U.S.C. § 2244(b)(3)(A).

ORDER

IT IS ORDERED that petitioner's motion to renew his application for a preliminary injunction or temporary restraining order is DENIED.

Entered this 20th day of September, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge