

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DAVID R. BROWN,

Petitioner,

v.

CASE NO. 09-3248-SAC

RAY ROBERTS, et al.,

Respondents.

O R D E R

Petitioner seeks a writ of habeas corpus under 28 U.S.C. § 2254 on allegations of error in his conviction in the Kansas state courts in Sedgwick County District Court Case 96-CR-1729. The court dismissed petitioner's first two habeas corpus petitions without prejudice, citing the possibility under Kansas law that petitioner could still pursue a direct appeal under the unique circumstances of petitioner's criminal proceeding. In petitioner's instant third attempt, the court dismissed the petition as time barred.

Petitioner filed a notice of appeal. Before the court is petitioner's request for an order granting him leave to proceed on appeal without payment of the appellate filing fee.

Petitioner paid the \$5.00 district court filing fee in the instant action, but has not paid the \$455.00 fee for his appeal. Court records reflect that petitioner submitted a \$5.00 payment to the Tenth Circuit Court of Appeals and to this court, and that both payments were returned to petitioner. Court correspondence with each returned payment advised petitioner that the filing fee for his appeal was \$455.00, and that he must either pay that full amount to

the district court, or submit a motion for leave to proceed in forma pauperis without prepayment of that appellate fee.

In response, petitioner argues he is not required to pay the \$455.00 filing fee "again" for his instant appeal because he paid the appellate filing fee in a previous appeal which was dismissed without prejudice to allow him to exhaust state court remedies before again seeking relief under § 2254. This argument is flawed.

Petitioner's instant appeal is not a continuation of any previous appeal. Pursuant to 28 U.S.C. § 1913 and Rule 3(e) of the Federal Rules of Appellate Procedure, petitioner must pay the \$455.00 appellate filing fee for his appeal, or he must seek and obtain leave to proceed in forma pauperis on appeal under 28 U.S.C. § 1915. Thus to the extent petitioner seeks an order from this court to allow him to proceed in his appeal without obligation to pay the \$455 appellate filing fee, that request is denied. Because petitioner's bare motion is insufficient on its face to determine whether leave to proceed in forma pauperis on appeal would be appropriate in this matter, the court grants petitioner additional time to submit a court approved form motion for seeking leave to proceed under § 1915.¹

IT IS THEREFORE ORDERED that petitioner's motion (Doc. 34) for an order allowing him to proceed on appeal without payment of the \$455.00 appellate filing fee required by 28 U.S.C. § 1913 and Fed.R.App.P. 3(e) is denied.

IT IS FURTHER ORDERED that petitioner is granted twenty (20)

¹The record reflects that the clerk's office recently sent petitioner a form motion for filing under § 1915.

days to submit EITHER the \$455.00 appellate filing fee OR an executed form motion for seeking leave to proceed in forma pauperis under 28 U.S.C. § 1915.

IT IS SO ORDERED.

DATED: This 24th day of October 2010 at Topeka, Kansas.

s/ Sam A. Crow
SAM A. CROW
U.S. Senior District Judge