

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

CALVIN GREGORY,

Petitioner,

ORDER

v.

02-C-510-C

JANE GAMBLE, Warden, Kettle Moraine
Correctional Institution,

Respondent.

Petitioner Calvin Gregory seeks a certificate of appealability from this court's order of February 19, 2003, dismissing his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Because petitioner has not paid the filing fee, I presume that he also seeks leave to proceed in forma pauperis on appeal. For the reasons stated below, I am granting him leave to proceed in forma pauperis but I am denying his request for a certificate of appealability.

As an initial matter, it appears that petitioner's appeal is timely even though this court did not receive it until March 31, 2003. For some reason, petitioner's application for a certificate of appealability was mailed to the court of appeals instead of this court. Petitioner's papers indicate that he placed them in the mail on or about March 17, 2003. Thus, pursuant to Rules 4(c) and 4(d) of the Rules of Appellate Procedure, his appeal is timely.

Because petitioner seeks leave to proceed in forma pauperis on appeal, this court must determine whether petitioner is taking his appeal in good faith. See 28 U.S.C. § 1915(a)(3).

Then, pursuant to 28 U.S.C. § 2253(c)(1)(A) and Fed. R. App. P. 22, this court must determine whether to issue a certificate of appealability to petitioner. To find that an appeal is in good faith, a court need only find that a reasonable person could suppose the appeal has some merit. Walker v. O'Brien, 216 F.3d 626, 631-32 (7th Cir. 2000). However, a certificate of appealability shall issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” Id.; see also 28 U.S.C. § 2253(c)(2). In order to make this showing, a petitioner must “sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’” Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893, n.4 (1983)). “Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” Slack, 529 U.S. at 484. However, a certificate of appealability determination is a threshold inquiry that is distinct from the underlying merits of the petition. “The question [when deciding whether to issue a certificate of appealability] is the debatability of the underlying constitutional claim, not the resolution of that debate.” Miller-El v. Cockrell, – S. Ct.–, 2003 WL 431659 (Feb. 25, 2003).

Applying these standards, I conclude that petitioner’s appeal is taken in good faith; therefore, he may proceed in forma pauperis. However, he has not shown that he is entitled

to a certificate of appealability. Petitioner contends that the state violated his constitutional rights under the Equal Protection Clause when it used one of its peremptory challenges to strike the only African-American juror from the venire panel, in violation of Batson v. Kentucky, 476 U.S. 79 (1986). This court dismissed the petition, finding that none of petitioner's challenges to the state courts' conclusion that no Batson violation had occurred were sufficient to show that the state courts either applied federal law erroneously or reached a decision that was based upon an unreasonable determination of the facts. Having re-reviewed petitioner's arguments, I am convinced that no reasonable jurist would debate that petitioner did not make the showing that is required by 28 U.S.C. § 2254(d). This was not a close case. Accordingly, his petition for a certificate of appealability must be denied.

ORDER

It is ORDERED that petitioner Calvin Gregory's petition for leave to proceed in forma pauperis is GRANTED and his motion for a certificate of appealability is DENIED.

Entered this 1st day of April, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge