IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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HARRY L. GANT,

ORDER

Petitioner,

04-C-0953-C

v.

JEFFREY ENDICOTT, Warden,
Redgranite Correctional Institution,

Respondent.

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On June 13, 2005, this court entered an order dismissing petitioner Harry Gant's application for a writ of habeas corpus. I concluded that petitioner had defaulted many of his claims in state court because he had failed to present them, and that the state courts' decisions on petitioner's two properly exhausted claims were not unreasonable or contrary to federal law. Petitioner now seeks leave to appeal in forma pauperis and seeks a certificate of appealability, apparently for each of the claims he raised in his petition. For the reasons stated below I am declining to grant petitioner's requests.

When reviewing a state habeas petitioner's request for leave to proceed in forma pauperis on appeal, this court must determine whether petitioner is taking his appeal in good faith. 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 find only 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)).

"When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack, 529 U.S. at484. Thus, "[d]etermining whether a COA should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding." Id. at 484-85.

In the instant case, I dismissed petitioner's petition after concluding that petitioner had defaulted all but two of his claims and that the state courts had resolved the two exhausted claims in a manner that was not unreasonable and not contrary to federal law.

There can be no serious debate about petitioner's failure to exhaust. His briefs to the state court of appeals and his petition for review to the state supreme court establish that the only claims petitioner presented to both courts were that his lawyer was ineffective, first for failing to object to the prosecutor's improper comments during closings, and second, for failing to seek in camera review of the victim's mental health records. Petitioner also presented a confrontation clause claim to the court of appeals, but he did not clearly present this claim in his petition for review to the state supreme court: in his petition for review, petitioner mentioned the disputed witness, Detective Anderson, only once in a passing reference supporting his claim that the prosecutor improperly vouched for state witnesses. This was not enough fairly to apprise the court that petitioner wished to present a confrontation clause claim.

Equally lacking in debatable merit is petitioner's fallback argument that a miscarriage of justice will result if his defaulted claims are not entertained on the merits. Petitioner would have to establish that, in light of all the evidence–including evidence allegedly illegally admitted, wrongly excluded, and evidence not available until after trial–it was more likely than not that "no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt."Schlup v. Delo, 513 U.S. 298, 32729 (1995). To meet this high burden

of persuasion, "a prisoner must have documentary, biological (DNA), or other powerful evidence." Hayes v. Battaglia, 403 F.3d 935, 938 (7th Cir. 2005). Petitioner has no such evidence, merely arguing that his victim's testimony was inherently incredible. The trial transcripts demonstrate that the victim's testimony was not inherently incredible and it was corroborated in large part by petitioner's confession. Petitioner has not presented any new evidence, let alone any evidence so powerful as to demonstrate his actual innocence.

Moving to petitioner's two exhausted claims against his trial attorney, petitioner has failed to show that the state court of appeals' decision was unreasonable or contrary to federal law. Citing to the applicable federal case law, the state court concluded that petitioner had not shown that his lawyer provided constitutionally inadequate representation when he failed to move for an in camera review of the victim's mental health records. The court held that petitioner had not made the showing necessary for obtaining such records and that, even if he had, he had not shown in his post-trial motions that not having the mental health records made any difference to the outcome of the trial. Petitioner was wanted the records as support for his claim of self-defense. The court of appeals determined that the records would have lent no support because they could not illuminate what petitioner knew before the attack that might have mitigated his acts. Petitioner did not need the records to show that his victim had lied about an attack by petitioner because petitioner acknowledged that he had attacked the victim. Both determinations were logical and supported by the record.

The court of appeals also correctly ruled against petitioner on his claim that his lawyer was ineffective for failing to object to the prosecutor's closing argument. This court has read the closing arguments and agrees with the court of appeals that the prosecutor's comments were not improper. Many of petitioner's complaints are nothing more than petitioner's mischaracterization of the record. Apart from this, it was not improper for the prosecutor to argue the comparative reliability of the various witnesses, to comment on the defendant's credibility, to comment on what the evidence shows, to argue that the defendant is guilty, and her exhortation to reject petitioner's story was based upon inferences reasonably drawn from the evidence. Therefore, the prosecutor's closing argument was proper. It follows that the court of appeals correctly concluded that petitioner's trial lawyer was not ineffective for failing to object.

Apart from this, the weight of the evidence against petitioner was substantial, and petitioner has not shown that any of the allegedly improper comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (citations and quotation marks omitted). In other words, counsel's failure to object did not make a difference to the outcome.

From this, I conclude that petitioner does not qualify for a certificate of appealability. Reasonable jurists could not debate his procedural defaults or the appropriateness of the state court decisions on petitioner's two remaining claims. None of the issues petitioner presents are adequate to deserve encouragement to proceed further.

As for petitioner's request for leave to proceed in forma pauperis on appeal, even applying the lower standard applicable to this request, I conclude that petitioner is not proceeding in good faith. No reasonable jurist could believe that petitioner's current appeal has merit. Accordingly, I must certify that defendant's appeal is not taken in good faith and that he cannot proceed in forma pauperis on appeal.

ORDER

IT IS ORDERED that petitioner Harry Gant's request for leave to proceed in forma pauperis on appeal is DENIED because I am certifying that his appeal is not taken in good faith.

Further, IT IS ORDERED that petitioner's request for a certificate of appealability is DENIED. Pursuant to Fed. R. App. P. 22(b), if a district judge denies an application for a certificate of appealability, the defendant may request a circuit judge to issue the certificate.

Entered this 12th day of August, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge