

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

ROGER O'NEAL,

Petitioner,

ORDER

v.

06-C-0149-C

BYRAN BARTOW, Director,
Wisconsin Resource Center,

Respondent.

Petitioner Roger O'Neal has filed a notice of appeal from this court's judgment of May 1, 2006, dismissing his petition for a writ of habeas corpus. He seeks leave to appeal in forma pauperis.

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. at 484. 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.

After allowing petitioner the opportunity to respond, this court dismissed the petition *sua sponte* after finding it was filed outside the one year limitations period and that petitioner had failed to establish that he was entitled to either statutory or equitable tolling. Jurists of reason would not debate the correctness of this procedural ruling. The petition was filed well outside the one-year limitations period. Petitioner’s only explanation for the delay was that he was attempting to obtain new legal representation during this time, but as this court explained in the May 1 order, this allegation failed to explain why petitioner did not file a

notice of intent to seek postconviction relief or ask his trial lawyers to file one on his behalf. He should not be encouraged to proceed further with a petition that is clearly untimely.

Moreover, although I find that petitioner is indigent for purposes of appeal, I am unable to certify that his appeal is taken in good faith. Even under this arguably lower standard, petitioner's appeal is so patently without merit that reasonable persons could not suppose it has any merit.

ORDER

IT IS ORDERED that petitioner Roger O'Neal'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 5th day of June, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge