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

DOUGLAS DEBRUIN,

Petitioner, ORDER

v. 03-C-0256-C

MATTHEW FRANK, Secretary, Wisconsin
Department of Corrections,

Respondent.

Petitioner Douglas DeBruin has filed a notice of intent to appeal this court's judgment entered August 29, 2003, dismissing his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner seeks leave to proceed in forma pauperis on appeal. I infer that petitioner also seeks a certificate of appealability, which is a statutory prerequisite to pursuing an appeal in a federal habeas case. See 28 U.S.C. § 2253(c)(1)(A) and Fed. R. App. P. 22. For the reasons stated below, I am denying both of petitioner's motions.

This court dismissed petitioner's habeas petition with prejudice after finding that petitioner had not filed it within the one-year statute of limitations set out in 28 U.S.C. § 2244(d). Petitioner argued that his petition was timely because he filed it within one year after the conclusion of his direct appeal from the circuit court's judgment resentencing him after his probation was revoked in August 2001. However, as this court explained in its opinion and order, petitioner's claims of constitutional error did not attack the post-

revocation judgment but related only to the original judgment of conviction, which had become final several years earlier. Calculating the one-year limitation period from that date led to the conclusion that the petition was untimely.

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). 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). I cannot make this finding. There was no question in this case that petitioner had missed his deadline for bringing a federal habeas challenge to his underlying conviction. Petitioner's insistence that his one-year limitations period should be calculated from the time the state court revoked his probation has no colorable basis in law or fact, and no reasonable person could suppose his appeal has some merit.

For the same reason, I am denying petitioner's request for a certificate of appealability. For this court to issue the certificate, it must find that "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 (emphasis added). 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.

Jurists of reason would not debate whether this court was correct to conclude that it was too late for petitioner to bring a federal habeas challenge to his underlying conviction. Petitioner did not challenge any of the underlying facts or deny that the constitutional errors of which he complained were related to his original judgment of conviction. Instead, he argued that his conviction was reopened to attack after he was sentenced after revoking his probation. Petitioner's argument is contrary to well-settled state and federal law. No reasonable jurist would conclude otherwise.

ORDER

Accordingly, IT IS ORDERED that petitioner Douglas DeBruin's petition for leave to proceed in forma pauperis and his motion for a certificate of appealability are both DENIED.

Dated this 26th day of September, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge