

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

JESSIE L. MCSHAN,

Petitioner,

ORDER

v.

03-C-0024-C

THOMAS VANDEN BOOM,
Superintendent, Felmers Chaney
Correctional Center,

Respondent.

Petitioner Jessie McShan has filed a notice of appeal from this court's dismissal of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner also seeks leave to proceed in forma pauperis on appeal. For the reasons stated below, I am denying petitioner leave to proceed in forma pauperis and am declining to issue a certificate of appealability.

In an order entered February 27, 2003, this court determined that petitioner's application for habeas relief had to be dismissed because petitioner had failed to file it within the statutory limitations period and there were no circumstances that would permit tolling the statute of limitations. Because the petition was dismissed on statutory procedural grounds, this court did not evaluate the merits of the claims raised in the petition.

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 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.

Petitioner contends that he was denied his right to a direct appeal from his conviction when his postconviction lawyer withdrew his representation of petitioner without filing a no-merit report. Although petitioner was aware in 1996 that his lawyer had not filed a no-merit report, petitioner did not attempt to seek relief from that action from the state courts until six years later, well after his limitations period for filing a federal habeas petition had expired. In light of these facts, jurists of reason would not debate that petitioner missed the statute of limitations under 28 U.S.C. § 2244(d) or that he has not stated a valid claim of the denial of a constitutional right. Accordingly, his request for a certificate of appealability must be denied. Furthermore, his appeal is so plainly without merit that he is not entitled to proceed in forma pauperis.

Entered this 15th day of April, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge