

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

JAMES L. KIRK,

Petitioner,

ORDER

v.

04-C-923-C

RANDALL R. HEPP, Warden, Jackson
Correctional Institution,

Respondent.

On March 4, 2005, this court entered judgment dismissing James L. Kirk's petition for a writ of habeas corpus under 28 U.S.C. § 2254 on the ground that he did not file it within the one-year statute of limitations set forth in 28 U.S.C. § 2244 and that no circumstances existed that would warrant tolling of the limitations period. Petitioner has now requested a certificate of appealability in accordance with 28 U.S.C. § 2253(c). He also requests leave to proceed in forma pauperis on appeal.

Petitioner's motion for leave to proceed in forma pauperis will be granted. Having considered the trust fund statement that petitioner submitted previously in this case, I find that he is unable to pay the appellate filing fee or post security therefor. Moreover, because reasonable persons could suppose his appeal has some merit, it is not brought in bad faith.

The motion for a certificate of appealability will be denied. A certificate of appealability shall issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” Walker v. O'Brien, 216 F.3d 626, 631-32 (7th Cir. 2000); 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.

Jurists of reason would not debate the correctness of this court’s conclusion that petitioner had failed to demonstrate that extraordinary circumstances beyond his control prevented him from filing his habeas application within the limitations period. As explained in this court’s order granting respondent’s motion to dismiss, petitioner failed to make out

a convincing case that he needed his state court transcripts before filing a postconviction motion in the state court or that he was prevented by circumstances beyond his control from pursuing a timely direct appeal of his conviction. Reasonable jurists would not think that the relatively ordinary set of circumstances alleged by petitioner makes his case one of those “rare” ones for which equitable tolling is available.

Because no substantial argument can be made that I erred in resolving the non-constitutional question, it is unnecessary to consider whether the petition presents any substantial constitutional issues for appeal.

ORDER

IT IS ORDERED that petitioner James Kirk’s application for leave to proceed in forma pauperis on appeal is GRANTED. His request for a certificate of appealability is DENIED.

Dated this 16th day of March, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge