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

HARRY GANT,

Petitioner, ORDER

v. 04-C-953-C

JEFFREY ENDICOTT, Warden,
Redgranite Correctional Institution,

Respondent.

Harry Gant requests this court to issue a certificate of appealability and to allow him to proceed in forma pauperis on appeal from this court's June 14, 2006 order denying his motion under Fed. R. Civ. P. 60(b) to reopen his habeas corpus petition. Although petitioner has not yet submitted the trust fund account statement necessary to determine whether he is indigent for the purposes of appeal, I am denying his motion because I find that his appeal is not taken in good faith. I will also deny his request for a certificate of appealability.

Petitioner's Rule 60(b) motion was based upon his contention that this court erred when it found that he had exhausted all of his state court remedies with respect to his claims. In support of his motion, petitioner submitted documents showing that the state court of appeals has allowed him to proceed on a claim of ineffective assistance of appellate counsel, known in Wisconsin as a Knight petition. State v. Knight, 168 Wis. 2d 509, 484 N.W. 2d

540 (1992) (petitioner may raise claim of ineffective assistance of appellate counsel by seeking writ of habeas corpus from court in which counsel was allegedly ineffective). Thus, petitioner argued, his habeas petition was "mixed" and this court should have dismissed it without prejudice under the rule of Rose v. Lundy, 455 U.S. 509 (1982), instead of adjudicating his claims on their merits. I rejected this contention, pointing out that petitioner had not raised a claim of ineffective assistance of appellate counsel in his federal habeas petition and that he had conceded during the habeas action that he had exhausted all of his available state court remedies with respect to the claims raised in the petition. I further found that the possibility that the state appellate court may reinstate petitioner's direct appeal in the event it rules in his favor on the merits of his Knight petition is not a circumstance rendering the judgment in this case unjust.

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 [certificate of appealability] 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. Where no substantial argument can be made that the district judge erred in resolving the procedural question, then no certificate of appealability should issue even if the constitutional question standing alone would have justified an appeal. Davis v. Borgen, 349 F.3d 1027, 1029 (7th Cir. 2003).

Jurists of reason would not find it debatable that in petitioner's previous petition, he did not raise a claim of ineffective assistance by his appellate lawyer. Petitioner never raised such a claim, never asked for permission to return to state court to pursue remedies there and never objected to the adjudication by this court of his claims on their merits. Because he has no colorable claim that this court erred or made a mistake when it decided his habeas petition, he should not be encouraged to proceed further.

The next question is whether petitioner is entitled to proceed in forma pauperis on appeal. For petitioner to proceed in forma pauperis, this court must find that petitioner is taking his appeal in good faith. 28 U.S.C. § 1915(a)(3). 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). Although this is a less demanding standard than that for determining whether to issue a certificate of appealability, I find that petitioner is unable to meet it. No reasonable person could suppose that there is any merit to petitioner's attempting to reopen a case on the basis of a claim that was never raised in the prior proceeding. As noted in the order denying his motion to reopen, other avenues of relief may be available to petitioner in the event the state court grants him a new appeal. Seeking to reopen the prior judgment is not one of them.

ORDER

IT IS ORDERED that:

1. 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.

2. Petitioner's request for leave to proceed in forma pauperis is DENIED because

I certify that his appeal is not taken in good faith. If petitioner wishes to appeal this decision, he must follow the procedure set out in Fed. R. App. P. 24(a)(5).

Entered this 3d day of August, 2006.

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