

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

JAMES KAUFMAN,

Petitioner,

ORDER

v.

05-C-313-C

RANDALL HEPP, Warden,
Jackson Correctional Institution,

Respondent.

On October 27, 2005, this court entered an order dismissing James Kaufman's petition for a writ of habeas corpus on the ground that he had failed to file it within the limitations period prescribed by 28 U.S.C. § 2244. Petitioner has now requested this court to issue a certificate of appealability and to allow him to proceed in forma pauperis on appeal.

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. If success on the procedural issue is essential and there is no substantial argument that the district judge erred in resolving that 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) (citing Anderson v. Litscher, 281 F.3d 672 (7th Cir. 2002)).

Petitioner's request for a certificate of appealability will be denied. There is no dispute that petitioner did not file his federal habeas petition until more than one year after his state court conviction for possession of child pornography became final. Petitioner's substantive claims and his contention that his petition was timely all are founded upon his contention that the United States Supreme Court recognized a "new" constitutional right to possess virtual child pornography when it decided Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002). The reasons why Free Speech Coalition is of no help to petitioner are set forth in detail in the order of October 27, 2005. Having re-reviewed that order, I am convinced that no jurist of reason would debate this court's conclusion that petitioner was not eligible for either statutory or equitable tolling.

I turn then to defendant's request for leave to proceed in forma pauperis on appeal. Even applying the lower standard applicable to this request, I conclude that defendant is not proceeding in good faith. As I pointed out in the October 27 order, petitioner has not adduced a scintilla of evidence to support his claim that he was convicted of possessing "virtual" child pornography or that the images of children discovered on his computer discs were virtual and not real. Petitioner's entire petition rests on a creative yet erroneous legal argument that no reasonable jurist could think had merit. Accordingly, petitioner's request for leave to proceed in forma pauperis on appeal will be denied.

ORDER

IT IS ORDERED that petitioner James Kaufman'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 23rd day of November, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge