

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

DAVID C. MYERS,

Petitioner,

ORDER

v.

06-C-0158-C

JUDY SMITH, Warden,
Oshkosh Correctional Institution,

Respondent.

On April 20, 2006, this court entered judgment dismissing David C. Myers's petition for a writ of habeas corpus on the ground that it was a successive petition over which this court lacked jurisdiction. Petitioner has now filed a notice indicating that he seeks to appeal that judgment. Because petitioner has not paid the \$455 appellate filing fee, I infer that he seeks leave to proceed *in forma pauperis* on appeal. To be entitled to proceed as a pauper, petitioner must satisfy this court that he is indigent and that he is taking his appeal in good faith. 28 U.S.C. § 1915(a)(1) & (3). As a prisoner seeking habeas corpus relief, petitioner must also satisfy the criteria for the issuance of a certificate of appealability under 28 U.S.C. § 2253(c)(1)(A) and Fed. R. App. P. 22.

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.” 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.

This court dismissed the petition on procedural grounds, concluding that it was petitioner’s third petition challenging his 1997 conviction and sentence for three counts of sexual contact with a child and that petitioner had not obtained permission from the court of appeals to file the petition. The court explained that although petitioner might be able to show that his petition falls under one of the exceptions to the general ban on successive

petitions, under 28 U.S.C. § 2244(b)(3)(A), the proper court to determine whether any of those exceptions apply is the court of appeals. This conclusion is mandated by the federal habeas statutes and is simply not debatable. Accordingly, petitioner is not entitled to a certificate of appealability.

Turning to petitioner's request for leave to proceed *in forma pauperis*, I note initially that petitioner has not submitted an affidavit of indigency or the 6-month trust fund account statement required by § 1915(a)(2). However, even assuming petitioner could establish that he is indigent, I would still deny his request for leave to proceed *in forma pauperis* because I conclude that his appeal is not taken in good faith. Not only is petitioner's appeal frivolous, it is unnecessary. Petitioner need not appeal the judgment, but need only file a motion in the court of appeals asking it to authorize this court to consider the petition and explaining why his petition qualifies for such authorization.

Entered this 1st day of May, 2006.

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