

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

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ALVERNICE SELLERS,

Petitioner,

ORDER

v.

06-C-0630-C

ROBERT HUMPHREYS, Warden,  
Racine Correctional Institution,

Respondent.

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Alvernice Sellers has filed a notice of appeal from this court's judgment entered February 23, 2007 dismissing his petition for a writ of habeas corpus. Petitioner asks this court to issue a certificate of appealability with respect to his claim that his trial lawyer was ineffective in various ways and his claim that the state committed a Brady violation when it failed to provide the defense with a copy of a criminal complaint charging one of the state's key witnesses, Jessica A., with various crimes.

Under 28 U.S.C. § 2253(c)(1)(A) and Fed. R. App. P. 22, a habeas petitioner seeking to appeal the dismissal of his habeas petition must first seek a certificate of appealability from the district court. 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.

In my opinion and order entered February 22, 2007, I found that petitioner’s claims of ineffective assistance of counsel and alleged Brady violation were procedurally defaulted because petitioner did not petition the Wisconsin Supreme Court for review of the court of appeals’ adverse decision on the claims. This conclusion is not reasonably debatable. Petitioner insists that the court of appeals suggested implicitly that he should present his Brady claim to the trial court on remand, but nothing in the appellate court’s decision supports petitioner’s interpretation. As I explained in the February 22 order, to properly challenge either the appellate court’s failure to consider the merits of his Brady claim or its

failure to consider claims of ineffective assistance of counsel that petitioner had not presented to the trial court, petitioner had to file a petition for review in the state supreme court. Petitioner concedes that he did not do so. In light of this clear procedural default, petitioner should not be encouraged to proceed further.

Moreover, petitioner's underlying claim that the state violated Brady by failing to disclose a criminal complaint against Jessica A. has no merit. As I explained in the February 22 opinion and order, petitioner was named as a co-defendant in that complaint. A Brady violation does not lie for the government's failure to disclose exculpatory material already known to the defendant.

Because petitioner has not paid the \$455 filing fee for taking an appeal, I presume that he seeks to proceed in forma pauperis. Although petitioner has not submitted a financial affidavit or six-month trust account statement from the institution from which I can find that petitioner is indigent, an indigency determination is unnecessary because petitioner's appeal is not taken in good faith. 28 U.S.C. § 1915(a)(3). In light of petitioner's clear procedural default and the lack of any reasonable foundation for his Brady claim, reasonable persons could not suppose petitioner's appeal has any merit. Walker v. O'Brien, 216 F.3d 626, 631-32 (7th Cir. 2000) (appeal is in good faith if reasonable person could suppose appeal has some merit).

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 27<sup>th</sup> day of March, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB  
District Judge