

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

RICHARD A. GRISWOLD,)	
)	
Petitioner,)	8:10CV55
)	
v.)	
)	
TECUMSEH STATE CORRECTIONAL)	MEMORANDUM AND ORDER
INSTITUTION,)	
)	
Respondent.)	
_____)	

This matter is before the Court on petitioner’s motion for leave to appeal in forma pauperis (“IFP”) (Filing No. [44](#)). Petitioner is a prisoner and has not previously been granted leave to proceed IFP in this matter. Also pending is petitioner’s request for a certificate of appealability (Filing Nos. [39](#) and [45](#)). For the reasons discussed below, petitioner’s motion for leave to appeal IFP will be granted and his request for a certificate of appealability will be denied.

I. Background

On September 1, 2010, the Court dismissed petitioner’s habeas corpus petition without prejudice and entered judgment against him (Filing Nos. [34](#) and [35](#)). Petitioner thereafter filed a timely notice of appeal and a motion for certificate of probable cause (Filing No. [39](#)).

On September 15, 2010, the Court liberally construed petitioner’s motion for certificate of probable cause as a motion for certificate of appealability (Filing No. [41](#) at CM/ECF p. 3).

In doing so, the Court directed petitioner to file a brief in support of his motion. (*Id.*) On October 19, 2010, petitioner filed a brief in support of a request for certificate of appealability (Filing No. [45](#)).

II. IFP Status

As set forth in [Federal Rule of Appellate Procedure 24\(a\)\(1\)](#):

Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

[Fed. R. App. P. 24\(a\)\(1\)](#). In light of the information provided by petitioner in his motion for leave to appeal IFP (Filing No. [44](#)), and pursuant to [Federal Rule of Appellate Procedure 24\(a\)](#), the Court concludes that petitioner may proceed IFP on appeal.

III. Request for Certificate of Appealability

Before a petitioner may appeal the dismissal of a petition for writ of habeas corpus, a "Certificate of Appealability" must issue. Pursuant to the Antiterrorism and

Effective Death Penalty Act of 1996 ("AEDPA"), the right to appeal such a dismissal is governed by [28 U.S.C. § 2253\(c\)](#), which states:

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from

—
(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;

. . .

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).¹

A certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. See [28 U.S.C. § 2253\(c\) \(2\)](#). Such a showing requires a demonstration "that reasonable jurists could debate whether (or, for that matter, agree that) the petition

¹ Similarly, [Fed. R. App. P. 22\(b\)](#), as amended by AEDPA, indicates that in an action pursuant to [28 U.S.C. § 2254](#), a notice of appeal triggers the requirement that the district judge who rendered the judgment either issue a certificate of appealability or state the reasons why such a certificate should not issue. See generally [Tiedeman v. Benson](#), [122 F.3d 518, 521 \(8th Cir. 1997\)](#).

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 \(2000\)](#) (internal quotation marks omitted) (citing [Barefoot v. Estelle, 463 U.S. 894 \(1983\)](#) (defining pre-AEDPA standard for a certificate of probable cause to appeal)).

“Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” [Slack, 529 U.S. at 484](#). Similarly, if the district court denies a petition for writ of habeas corpus on procedural grounds without reaching the underlying constitutional claims on the merits:

[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 . . . would find it debatable whether the district court was correct in its procedural ruling Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed

further. In such a circumstance,
no appeal would be warranted.

Id.

The Court has carefully reviewed the record and petitioner's brief in support of a request for certificate of appealability (Filing No. [45](#)). Petitioner has failed to demonstrate that reasonable jurists would find this Court's ruling debatable or wrong. For the reasons stated in its September 1, 2010, memorandum and order (Filing No. [34](#)), the Court declines to issue a certificate of appealability.

IT IS ORDERED:

1. Petitioner's motion for leave to appeal IFP (Filing No. [44](#)) is granted.
2. Petitioner's request for a certificate of appealability is denied without prejudice to reassertion before the Eighth Circuit.
3. The clerk of the court shall provide the Court of Appeals a copy of this memorandum and order.

DATED this 29th day of October, 2010.

BY THE COURT:

/s/ Lyle E. Strom

LYLE E. STROM, Senior Judge
United States District Court

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