

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID DRONE,

Defendant.  
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ORDER

03-CR-0089-C  
06-C-325-C

Three days after he filed a notice of appeal from the judgment entered in this case on July 19, 2006, denying his motion for post-conviction relief pursuant to 28 U.S.C. § 2255, defendant David Drone moved pursuant to Fed. R. Civ. P. 59 to alter or amend the judgment. The filing of a Rule 59 motion suspends the operation of an appeal until the Rule 59 motion is decided. On August 9, 2006, I denied defendant's Rule 59 motion. In the same order, I advised defendant that he had thirty days from August 9 in which to amend his notice of appeal to include a challenge to the denial of his Rule 59 motion. I told defendant that in the meantime, I would delay ruling on his request for leave to proceed in forma pauperis on appeal and on his request for a certificate of appealability. On

September 8, 2006, defendant filed his amended notice of appeal. Therefore, the matter is presently before the court for a determination whether defendant may proceed in forma pauperis on appeal and whether he is entitled to a certificate of appealability.

According to 28 U.S.C. § 1915(a), a defendant who is found eligible for court-appointed counsel in the district court proceedings may proceed on appeal in forma pauperis without further authorization “unless the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed.” Defendant had appointed counsel during his criminal proceedings. Furthermore, I do not intend to certify that the appeal is not taken in good faith. Defendant’s challenges to his sentence are not wholly frivolous. A reasonable person could suppose that they have some merit. Lee v. Clinton, 209 F.3d 1025, 1026 (7th Cir. 2000).

A certificate of appealability shall issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” § 2253(c)(2). Before issuing a certificate of appealability, a district court must find that the issues the applicant wishes to raise are ones that “are debatable among jurists of reason; that a court *could* resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further.” Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983). “[T]he standard governing the issuance of a certificate of appealability is not the same as the standard for determining whether an appeal is in good faith. It is more demanding.” Walker v. O'Brien, 216 F.3d

626, 631 (7th Cir. 2000).

None of defendant's challenges to his sentence meet the demanding standard for a certificate of appealability. In the order denying defendant's § 2255 motion, I explained clearly why there is no legal merit to defendant's assertions that 1) before this court could sentence him as a career offender, a jury was required to make a determination of his prior convictions; 2) his Fifth Amendment right to due process was violated by the government's withholding of critical exculpatory evidence; and 3) his counsel was ineffective in investigating the existence of exculpatory evidence. Because the issues defendant wishes to raise on appeal are not debatable among reasonable jurists, a court could not resolve the issues differently and the questions are not adequate to deserve encouragement to proceed further, I am declining to issue a certificate of appealability.

Defendant has the right to appeal this order denying him a certificate of appealability.

#### ORDER

IT IS ORDERED that defendant David Drone's request for leave to proceed in forma

pauperis on appeal is GRANTED and his request for a certificate of appealability is DENIED.

Entered this 20th day of September, 2006.

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