

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH ISHAM, SR.,

Defendant.  
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ORDER

03-CR-0141-C  
05-C-0206-C

Defendant Joseph Isham, Sr. has filed a notice of appeal from the judgment entered in this case on February 10, 2006, denying his motion for post conviction relief brought pursuant to 28 U.S.C. § 2255. Accompanying the notice of appeal is a motion for a certificate of appealability, which defendant must have in order to appeal. 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22. Defendant has not paid the \$455 filing fee for his appeal. Therefore, I construe defendant's motion as including a request for leave to proceed in forma pauperis on appeal pursuant to 28 U.S.C. § 1915.

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 the criminal proceedings against him and I do not intend to certify that the appeal is not taken in good faith. Defendant’s challenge to his sentence is not wholly frivolous. A reasonable person could suppose that it has some merit. Lee v. Clinton, 209 F.3d 1025, 1026 (7th Cir. 2000).

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).

In his motion for a certificate of appealability, defendant asks for certification of the following issues: (1) whether his sentence should be vacated because he was denied the effective assistance of counsel at sentencing when his lawyer failed to challenge the court’s

reliance for sentencing purposes on facts related to the number of guns found in defendant's possession; (2) whether his rights under the Fifth and Sixth Amendments were violated when the court imposed a sentence under the Sentencing Guidelines that was enhanced on the basis of facts that no jury had found beyond a reasonable doubt; and (3) whether he is entitled to an evidentiary hearing on these issues. Defendant relies on the Supreme Court's holding in United States v. Booker, 125 S. Ct. 738 (2005), that sentencing judges cannot impose a mandatory sentence under the Sentencing Guidelines if the sentence is based upon facts not admitted by the defendant or found by a jury beyond a reasonable doubt.

None of defendant's challenges to his sentence meet the demanding standard for a certificate of appealability. As I explained in the order entered on May 18, 2005, at the time defendant was sentenced it was not improper for federal courts to base their sentencing guideline determinations on facts that had not been found by a jury beyond a reasonable doubt. Therefore, defense counsel was not ineffective for her failure to object to the sentencing on that basis and an evidentiary hearing is not necessary on these issues. Therefore, I decline to issue a certificate of appealability.

#### ORDER

IT IS ORDERED that defendant Joseph Isham, Sr.'s request for leave to proceed in

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

Entered this 21st day of April, 2006.

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