

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

ANDREW MATTHEW OBRIECHT,

Petitioner,

ORDER

v.

05-C-489-C

BYRAN BARTOW, Director,
Wisconsin Resource Center,

Respondent.

On December 1, 2005, this court entered an order denying Andrew Matthew Obriecht's petition for a writ of habeas corpus. Petitioner has now requested this court to issue a certificate of appealability and to allow him to proceed in forma pauperis on appeal.

When reviewing a state habeas petitioner's request for leave to proceed in forma pauperis on appeal, this court must determine whether petitioner is taking his appeal in good faith. 28 U.S.C. § 1915(a)(3). Then, pursuant to 28 U.S.C. § 2253(c)(1)(A) and Fed. R. App. P. 22, this court must determine whether to issue a certificate of appealability to petitioner. 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." 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)).

Petitioner cannot make this showing. Petitioner raised the following six claims in this court: 1) his trial lawyer was ineffective for failing to object when the district attorney handed a copy of the information to petitioner's attorney and not to petitioner and did not read the information aloud in court; 2) his plea of no contest to the charge of escape from custody was not knowing and voluntary because the trial court failed to ascertain that he understood the nature of the charge; 3) his plea was not knowing and voluntary because his trial attorney gave him inaccurate information, failed to explain the nature of the charge and failed to conduct any pretrial investigation; 4) the criminal charge was void because it charged no offense and was jurisdictionally defective; 5) his post-conviction lawyer had a direct conflict of interest and failed to exercise due diligence; and 6) the state did not file a response to Obrieht's post-conviction motion as required by Wis. Stat. § 974.02. The first and last claims do not afford a basis on which to grant a certificate of appealability because they allege at most violations of state law that do not give rise to any constitutional violation. Claims two through five, though setting forth plausible constitutional claims, are all based on petitioner's belief that the legality of the conviction that gave rise to the sentence he was serving at the time he escaped was an element of the charge that the state

had to prove to establish his guilt of an escape from custody. As explained in this court's previous orders, that belief is erroneous. Petitioner's view of the law of escape is not one that is subject to debate by reasonable jurists. Because all of his constitutional claims rest upon an understanding of the law that is plainly incorrect, he has not made a substantial showing of the denial of a constitutional right.

I turn then to defendant's request for leave to proceed in forma pauperis on appeal. As should be plain from the foregoing discussion, petitioner cannot meet even the lower standard applicable to this request. Petitioner's claims rests on an erroneous legal argument that no reasonable jurist could think had merit. His refusal to accept the determination of the various judges who have tried to explain this to him is not in good faith. Accordingly, petitioner's request for leave to proceed in forma pauperis on appeal will be denied.

ORDER

IT IS ORDERED that petitioner Andrew Matthew Obriecht's request for leave to proceed in forma pauperis on appeal is DENIED because I am certifying that his appeal is not taken in good faith.

Further, IT IS ORDERED that 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.

Entered this 9th day of December, 2005.

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