

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID H. BRUMFIELD,

Defendant.  
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ORDER

03-C-0687-C

00-CR-0118-C-01

Defendant David H. Brumfield has filed a notice of appeal and a request for a certificate of appealability from the denial of his motion brought pursuant to 28 U.S.C. § 2255. He has not paid the \$255 fee for filing his notice of appeal which is required if he is to take an appeal from the denial of a § 2255 motion. 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22. Therefore, I construe defendant's notice as including a request for leave to proceed in forma pauperis on appeal pursuant to 28 U.S.C. § 1915. Defendant's request for leave to proceed in forma pauperis on appeal will be denied for the same reason that I decline to issue 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 is not entitled to proceed on appeal in forma pauperis because I am declining to issue a certificate of appealability.

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). Although defendant has not submitted a statement of the issues he wishes to raise on appeal or even asked expressly for a certificate of appealability, I will assume he wishes to appeal the ruling that he failed to show that his trial representation was constitutionally ineffective.

Defendant's challenge is without merit. I explained clearly in the order denying defendant's § 2255 motion why defendant's counsel's performance was not defective and why, in any event, defendant was not prejudiced by his counsel's failure to file a motion to challenge the factual assertions in the indictment. In particular, I told defendant that any motion his lawyer might have filed to challenge factual assertions in the indictment would

have been denied because the only way to challenge facts underlying an indictment is to go to trial. Furthermore, I ruled that defendant was not prejudiced by his counsel's failure to tell him that at his sentencing he would be held responsible for all his relevant conduct, because the court and the government made it clear to defendant at his plea hearing that such conduct would be considered and because the relevant conduct was described in detail in the pretrial sentence report.

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 H. Brumfield's requests for leave to

proceed in forma pauperis on appeal and for a certificate of appealability are DENIED.

Entered this 9th day of March, 2004.

BY THE COURT:

BARBARA B. CRABB  
District Judge