IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

ORDER

04-C-0885-C
01-CR-0032-C-01

v.

MICHAEL L. BROWN,

Defendant.

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Defendant Michael L. Brown has filed a notice of appeal 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 or requested a certificate of appealability, 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 and a request for 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 was found eligible for court-appointed counsel and I am not prepared to certify that his appeal is not taken in good faith. A reasonable person could find that the appeal has some merit.

However, I will deny his request for a certificate of appealability. Such a certificate is to issue "only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2). The standard for a certificate of appealability is higher than the standard for finding that appeal is taken in good faith; for a certificate, the court must find that defendant has made a substantial showing of the denial of a constitutional right; for an appeal in good faith a court need find only that a reasonable person could suppose that the appeal has some merit. Walker v. O'Brien, 216 F.3d 626, 631-32 (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). 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 and that the government failed to establish that he used a firearm as that term is defined in 18 U.S.C. § 924(c)(1). 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 that his contention that the government failed to establish that he used a firearm as that term is defined in 18 U.S.C. § 924.(c)(1) should have been raised on direct appeal. I do not believe that "jurists of reason" would debate the issues defendant wishes to raise. I cannot find that defendant has made a substantial showing of the denial of a constitutional right. Therefore, I decline 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 Mark L. Brown's request for a certificate of appealability is DENIED.

Entered this 31st day of January, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge