

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

DA VANG,

Petitioner,

ORDER

v.

02-C-298-C

JON LITSCHER,

Respondent.

Petitioner Da Vang has filed a motion for a certificate of appealability so that he may challenge this court's dismissal of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner also seeks leave to proceed in forma pauperis on appeal. For the reasons stated below, I am denying both motions.

Because petitioner seeks leave to proceed in forma pauperis on appeal, this court must determine whether petitioner is taking his appeal in good faith. See 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)). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack, 529 U.S. at 484. However, a certificate of appealability determination is a threshold inquiry that is distinct from the underlying merits of the petition. "The question [when deciding whether to issue a certificate of appealability] is the debatability of the underlying constitutional claim, not the resolution of that debate." Miller-El v. Cockrell, 2003 WL 431659 (U.S. Feb. 25, 2003).

Applying these standards, I conclude that petitioner's appeal is taken in good faith; therefore, he may proceed in forma pauperis. However, he has not shown that he is entitled to a certificate of appealability. Petitioner's claims of ineffective assistance of counsel and unreasonable government interference with his right to counsel are based primarily on his own version of the facts. As this court found, these facts are either unsupported by any evidence in the record (much less evidence that is "clear and convincing") or are immaterial to his constitutional claims. Further, even if reasonable jurists could conclude that petitioner's perception that the state was listening to his conversations with his attorney may have made it more difficult for petitioner to communicate with his lawyer, no reasonable

jurist could conclude that the state had deprived petitioner of any constitutional right absent any showing that this difficulty affected the outcome of petitioner's trial. In sum, because reasonable jurists would not debate that petitioner cannot obtain habeas relief on his claims, his request for a certificate of appealability must be denied.

ORDER

It is ORDERED that petitioner Da Vang's petition for leave to proceed in forma pauperis is GRANTED and his motion for a certificate of appealability is DENIED.

Entered this 11th day of March, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge