

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES LOWE,

Defendant.

ORDER

08-cv-318-bbc

06-cr-227-bbc

Defendant James Lowe has filed a notice of appeal and a request for a certificate of appealability from the court's June 20, 2008 order and judgment denying his motion for post-conviction relief brought pursuant to 28 U.S.C. § 2255. Defendant has not paid the \$455 filing fee, which makes it necessary to decide whether he is entitled to proceed on appeal in forma pauperis. Also, defendant has filed a "motion to amend," that I construe as a motion for correction or modification of the record on appeal pursuant to Fed. R. App. P. 10(e). I will address the latter motion first.

Fed. R. App. P. 10(e) provides,

(1) If any difference arises about whether the record truly discloses

what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.

(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:

- (A) on stipulation of the parties;
- (B) by the district court before or after the record has been forwarded; or
- (C) by the court of appeals.

(3) All other questions as to the form and content of the record must be presented to the court of appeals.

In support of his request for modification of the record on appeal, defendant asks that the court include in the record on appeal a letter he received from his lawyer dated May 19, 2008. Defendant submitted this letter to this court on June 6, 2008, before I ruled on his § 2255 motion. Because the letter is part of the record in this court, it is appropriate to include it in the record on appeal.

I turn then to defendant's requests for leave to proceed in forma pauperis on appeal and 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 had court-appointed counsel during the criminal

proceedings against him and I do not intend to certify that his 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. Cf., Lee v. Clinton, 209 F.3d 1025, 1026 (7th Cir. 2000). Therefore, I will grant him leave to proceed on appeal in forma pauperis.

As to the certificate of appealability, a certificate 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). "[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).

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 June 20, 2008, there is no merit to defendant's claims that he was denied effective assistance of counsel. For that reason, I conclude that the issues defendant seeks to raise on appeal are not debatable among reasonable jurists, no court would resolve the issues differently and the questions are not adequate to deserve encouragement to proceed further. Therefore, I decline to issue a

certificate of appealability.

ORDER

IT IS ORDERED that defendant James Lowe's "motion to amend," construed as a motion to modify the record on appeal pursuant to Fed. R. App. P. 10, is GRANTED.

Further, IT IS ORDERED that defendant's request for leave to proceed in forma pauperis on appeal is GRANTED; his request for a certificate of appealability is DENIED.

Entered this 30th day of July, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge