

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

ROBERT A. MOORE,

Petitioner,

ORDER

v.

07-C-008-C

PAMELA WALLACE, Warden,
Stanley Correctional Institution,

Respondent.

Petitioner Robert A. Moore has filed a notice of appeal from this court's judgment denying his application for a writ of habeas corpus. He seeks leave to proceed *in forma pauperis* on appeal. In addition, he requests this court to issue a certificate of appealability.

The petition raised two claims: 1) that a post-sentencing change in the Wisconsin Department of Corrections' parole policy has effectively abolished petitioner's right to be released on discretionary parole, in violation of the constitution's ban on *ex post facto* laws; and 2) the refusal of the circuit court to reduce petitioner's sentence on the basis of the change in parole policy violates petitioner's right to equal protection because some courts have reduced the sentences of other inmates in light of the new policy. I dismissed the first claim without prejudice on the ground that it had to be brought under § 1983 and could not be brought under § 2254. I dismissed the second claim with prejudice on the ground that it failed to set forth a cognizable constitutional violation.

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. His allegation that the state circuit court should have found that the department had changed its parole policy and that this change in policy is a “new factor” warranting a reduction in petitioner’s sentence presents at most an error of state law that is not cognizable on federal habeas review. In the order dismissing the petition, I explained why petitioner’s claim that he was denied his right to equal protection had no merit. Reasonable jurists would not debate this conclusion.

Insofar as petitioner seeks to appeal my determination that his *ex post facto* challenge to department’s change in parole policy had to be brought as a § 1983 claim, he may do so without first obtaining a certificate of appealability. A petitioner is required to obtain a certificate when the detention of which he complains “arises out of process issued by a State court.” 28 U.S.C. § 2253(c)(1)(A); Anderson v. Benik, 471 F.3d 811, 814 (7th Cir. 2006).

Because petitioner's *ex post facto* claim challenges the actions of corrections officials, rather than his conviction or sentencing in state court, he does not need a certificate of appealability with respect to that claim. Anderson, 471 F.3d at 814.

With respect to petitioner's request to proceed *in forma pauperis* on appeal, I cannot certify that his appeal is not taken in good faith. A reasonable person could suppose the appeal has some merit. However, I cannot decide whether to grant his petition until petitioner submits an affidavit of indigency accompanied by the required six-month trust account statement. Accordingly, the court will take no action on petitioner's request to proceed *in forma pauperis* on appeal until he submits this affidavit of indigency, a blank copy of which is enclosed with this order.

ORDER

Petitioner Robert Moore's request for a certificate of appealability is DENIED with respect to his equal protection claim. Petitioner need not obtain a certificate to appeal this court's determination that his *ex post facto* claim must be brought as a civil action under § 1983.

Petitioner's request for leave to proceed *in forma pauperis* on appeal is STAYED until petitioner submits an affidavit of indigency.

Entered this 26th day of February, 2007.

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