

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICHARD C. WURZINGER,

Defendant.

ORDER

05-cr-52-bbc

07-cv-466-bbc

On August 24, 2009, I dismissed Richard C. Wurzinger's petition for a writ of habeas corpus under 28 U.S.C. § 2255 without prejudice for petitioner's failure to obtain the authorization required by 28 U.S.C. § 2244(b)(3)(A). Now before the court is petitioner's motion for a certificate of appealability.

Generally, to issue a certificate of appealability, the court must find that the applicant has "made a substantial showing of the denial of a constitutional right." Walker v. O'Brien, 216 F.3d 626, 631-32 (7th Cir. 2000); see also 28 U.S.C. § 2253(c)(2). In this case, I did not consider the merits of the petition because I did not have jurisdiction to do so. Thus, the sole question for appeal is whether I erred in concluding that petitioner had filed a successive petition.

When a court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a certificate should issue when the prisoner shows, at least, "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000). See also Beyer v. Litscher, 306 F.3d 504, 505 (7th Cir. 2002) (applying this standard to claim dismissed under § 2244(b)(3)). Because it is not reasonably debatable whether Wurzinger's petition is a "second or successive petition" within the meaning of § 2244(b)(3), petitioner's request for a certificate of appealability must be denied.

ORDER

IT IS ORDERED that defendant Richard Wurzinger's request for a certificate of appealability is DENIED. Pursuant to Fed. R. App. P. 22(b), if a district judge denies an application for a certificate of appealability, the petitioner may request a circuit judge to

issue the certificate.

Entered this 15th day of February, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge