IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

ORDER

Plaintiff,

07-cr-149-bbc
12-cv-429-bbc

v.

ELIZABETH CIRVES,

Defendant.

- -

On July 3, 2012, I denied a motion filed by defendant Elizabeth Cirves to vacate, set aside or correct her sentence under 28 U.S.C. § 2255. I determined that defendant's motion, which she filed on June 19, 2012, dkt. #1, 12-cv-429-bbc, was untimely because her deadline for seeking relief under § 2255 had expired no later than October 31, 2010. Alternatively, I concluded that her sole claim for relief, which was based on United States v DePierre, 131 S. Ct. 2225 (2011), was not one on which she could prevail. Defendant filed a motion for reconsideration, which I denied on August 28, 2012.

Defendant has now filed a notice of appeal from the July 3, 2012 order. Her notice of appeal was not accompanied by the $455 fee for filing an appeal. Therefore, I construe it as including a request for leave to proceed in forma pauperis on appeal pursuant to 28

U.S.C. § 1915. 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 appointed counsel during the criminal proceedings against her and I do not intend to certify that the appeal is not taken in good faith. Defendant's challenge to her sentence is not wholly frivolous. A reasonable person could suppose that it has some merit. Lee v. Clinton, 209 F.3d 1025, 1026 (7th Cir. 2000).

Defendant has not requested a certificate of appealablity under 28 U.S.C. § 2253(c)(1)(B) and I failed to address such a certificate in the July 3, 2012 order, so I will address it now. "[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). Such a certificate shall issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A defendant makes a "substantial showing where 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." Arredondo v. Huibregtse, 542 F.3d 1155, 1165 (7th Cir. 2008). Where denial of relief is based on procedural grounds, the defendant also must show 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).

Defendant's challenge to her sentence does not meet the demanding standard for a certificate of appealability. She has not alleged specific facts showing that she was unable to file a timely post conviction motion in this case before the deadline expired on October 31, 2010, and she has not shown that reasonable jurists would disagree with my procedural ruling on this issue. There is no support anywhere in the law for defendant's arguments that she was sentenced improperly in light of the Supreme Court's decision in DePierre or on any other ground. Because reasonable jurists would not disagree about this conclusion, I must deny defendant's request for a certificate of appealability. Pursuant to Fed. R. App. P. 22(b), if a district judge denies an application for a certificate of appealability, the defendant may request a circuit judge to issue the certificate.

ORDER

IT IS ORDERED that defendant Elizabeth Cirves's request for leave to proceed in forma pauperis on appeal is GRANTED. A certificate of appealability is DENIED.

Entered this 20th day of September, 2012.

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