

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

GIORGIO R. BEARD,

Defendant.

ORDER

12-cv-920-bbc

09-cr-139-bbc

In an order entered on December 26, 2012, I denied defendant Giorgio R. Beard's motion for post conviction relief under 28 U.S.C. § 2255. In doing so, I neglected to address the issuance of a certificate of appealability under the newly effective amendments to Rule 11 of the Rules Governing Section 2255 Cases in the United States District Courts. Defendant has now filed a motion for reconsideration and request for a certificate of appealability of the December 26, 2012 order.

As I explained in the order, Amendment 742 was not made retroactive so it could not have applied to defendant's sentence, which was imposed well before the amendment took effect. Defendant's appellate counsel did not provide ineffective assistance by failing to argue an issue on which defendant could not prevail. (In reviewing the December 26, 2012 order, I realized that it was a mistake to imply that Amendment 742 applied to points assessed for committing a crime on supervised release or probation. It applied only to the

issue of recency under U.S.S.G. § 4A1.1(e).)

As to defendant's motion for reconsideration, nothing in it convinces me that it was a mistake to deny his § 2255 motion or that the judgment should be vacated to give defendant an opportunity to re-argue his motion.

Next, addressing defendant's request for a certificate of appealability, 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). In order to make this showing, a defendant 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)).

Although Rule 11 allows the court to direct the parties to submit arguments on the question of issuing a certificate of appealability, it is unnecessary to do so in this instance. No reasonable jurist would believe that defendant's motion has any merit. As I explained in the December 26, 2012 order, counsel cannot be held to be ineffective for failing to argue a claim for which there is no support in the law.

ORDER

IT IS ORDERED that defendant Giorgio R. Beard's motion for reconsideration and

request for a certificate of appealability are DENIED.

Entered this 10th day of January, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge