

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

UNITED STATES OF AMERICA,

Plaintiff,

ORDER
03-C-0364-C
00-CR-0092-C-01

v.

FILIMON SANDOVAL-GOMEZ,

Defendant.

On December 10, 2003, I denied defendant Filimon Sandoval-Gomez's request for leave to proceed in forma pauperis on appeal from the denial of his motion brought pursuant to 28 U.S.C. § 2255 and declined to issue a certificate of appealability. At the close of the December 10 order, I advised defendant that he was permitted to appeal the decision to deny him a certificate of appealability. Defendant then filed a document titled "notice of appeal" directly with the Court of Appeals for the Seventh Circuit, in which he asked for review of this court's December 10 order denying his request for a certificate of appealability. The court of appeals forwarded defendant's "notice of appeal" to this court for a determination whether defendant could proceed in forma pauperis. Believing the content

of the “notice of appeal” made it clear that the filing was nothing more than a request for a certificate of appealability addressed directly to the court of appeals as permitted under Fed. R. App. P. 22(b)(2), this court returned the document to the court of appeals. Now it has been returned to this court a second time, with instructions to treat the document as a second notice of appeal.

Fed. R. App. P. 22(b)(1) and (2) state in pertinent part:

(1) . . . If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

From these rules, it appears clear that defendant is entitled to ask the court of appeals to issue a certificate of appealability after a district court declines to do so. However, as is apparent from this repeated exchange of defendant’s request between the court of appeals and this court, it is important that any request for issuance of a certificate of appealability made to the court of appeals be titled “Request for Issuance of a Certificate of Appealability” and not “Notice of Appeal.” I regret that the statement in this court’s December 10 order that defendant was entitled to appeal this court’s decision to deny him a certificate of

appealability has led to such confusion.

In compliance with the direction of the court of appeals that I treat defendant's "notice of appeal" from the December 10 order as a new notice of appeal, I will deny defendant leave to proceed in forma pauperis on appeal for the same reasons I gave in the December 10 order. If defendant wishes a circuit judge to consider his request for a certificate of appealability from the December 10 order of this court, he should submit his request directly to the court of appeals, making sure that he does *not* title the request a "notice of appeal."

ORDER

IT IS ORDERED that defendant's request is DENIED for leave to proceed in forma pauperis from the December 10, 2003 order denying him leave to proceed in forma pauperis on appeal from this court's decision to deny his § 2255 motion and declining to issue a certificate of appealability.

Entered this 2nd day of February, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge