

September 23, 2004

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-60636
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL G. ROBERTS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:00-CV-174-WS
USDC No. 3:92-CR-92-WS

Before JONES, BARKSDALE and PRADO, Circuit Judges.

PER CURIAM:*

Michael G. Roberts, federal prisoner # 03107-043, requests this court to grant him a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion based on the successive nature of the motion.

A COA motion may be granted only if the movant makes a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2). When the district court denies federal habeas relief on procedural grounds and does not reach the

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

underlying constitutional claim, "a COA should issue . . . [if] 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).

The district court did not notify Roberts of its intent to treat the audita querela motion as a 28 U.S.C. § 2255 motion and did not afford Roberts the opportunity to withdraw the motion or to amend it to include all of his 28 U.S.C. § 2255 claims. Thus, Roberts' prior motion does not constitute his first 28 U.S.C. § 2255 motion precluding the filing of another motion based on its being successive in nature. See Castro v. United States, 124 S. Ct. 786, 789, 792 (2003).

Accordingly, we GRANT Roberts COA on the issue whether the district court erred in denying Roberts' motion as successive, VACATE the district court's denial of 28 U.S.C. § 2255 relief, and REMAND to the district court for consideration of the merits of the 28 U.S.C. § 2255 motion. See Dickinson v. Wainwright, 626 F.2d 1184, 1186 (5th Cir. 1980).

Roberts motion to proceed in forma pauperis on appeal is GRANTED.