

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

THOMAS EDWARD NESBITT,)
)
 Petitioner,)
)
 v.)
)
 ROBERT HOUSTON, Director, State)
 of Nebraska Department of)
 Correctional Services,)
)
 Respondent.)

4:10CV3099

**MEMORANDUM
AND ORDER**

On September 2, 2010, the court dismissed Petitioner’s habeas corpus claims without prejudice and entered Judgment against him. (Filing Nos. [24](#) and [25](#).) On September 15, 2010, Petitioner filed a “Ex-Parte Praecipe for Transfer of Records to [the] Eighth Circuit,” which the court liberally construes as a Notice of Appeal. (Filing No. [26](#).)

However, before Petitioner may appeal the dismissal of his Petition for Writ of Habeas Corpus, a “Certificate of Appealability” must issue. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), the right to appeal such a dismissal is governed by [28 U.S.C. § 2253\(c\)](#), which states:

- (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
 - (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;

- (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
- (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph(2).¹

A certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. See [28 U.S.C. § 2253\(c\)\(2\)](#). Such a showing requires a demonstration “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 \(2000\)](#) (internal quotation marks omitted), citing [Barefoot v. Estelle, 463 U.S. 894 \(1983\)](#) (defining pre-AEDPA standard for a certificate of probable cause to appeal).

Petitioner has not filed a motion for a Certificate of Appealability or a brief in support. (See Docket Sheet.) Thus, this matter cannot proceed on appeal until the question of the certificate of appealability is considered.

IT IS THEREFORE ORDERED that:

1. Petitioner shall have until October 20, 2010, to file a motion for Certificate of Appealability and brief in support.

¹Similarly, [Federal Rule of Appellate Procedure 22\(b\)](#), as amended by the AEDPA, indicates that in an action pursuant to [28 U.S.C. § 2254](#), a notice of appeal triggers the requirement that the district judge who rendered the judgment either issue a certificate of appealability or state the reasons why such a certificate should not issue. See generally [Tiedeman v. Benson, 122 F.3d 518, 521 \(8th Cir. 1997\)](#).

2. In the event that Petitioner fails to file a motion and brief, as set forth in this Memorandum and Order, the court will deny the issuance of a Certificate of Appealability without further notice.

3. The Clerk of the court is directed to set a pro se case management in this case with the following text: October 20, 2010: check for filing of motion for Certificate of Appealability.

DATED this 20th day of September, 2010.

BY THE COURT:

Richard G. Kopf
United States District Judge

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