## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

NICCOLE A. WETHERELL,	) CASE NO. 8:09CV32
	)
Petitioner,	)
	) MEMORANDUM
<b>v</b> .	) AND ORDER
	)
JOHN DAHM,	)
Deenendent	
Respondent.	)

## On September 1, 2009, the court dismissed Petitioner's habeas corpus claims with prejudice and entered judgment against her. (Filing Nos. 20 and 21.) Petitioner filed a timely Notice of Appeal of the court's Judgment on September 29, 2009. (Filing No. 22.)

Before Petitioner may appeal the dismissal of her 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 <u>28 U.S.C. § 2253(c)</u>, 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).<sup>1</sup>

<sup>&</sup>lt;sup>1</sup>Similarly, <u>Federal Rule of Appellate Procedure 22(b)</u>, as amended by the AEDPA, indicates that in an action pursuant to <u>28 U.S.C. § 2254</u>, 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* <u>*Tiedeman v. Benson*, 122 F.3d 518, 521 (8th Cir. 1997)</u>.

A certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. See <u>28 U.S.C. § 2253(c)(2)</u>. 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." <u>Slack v. McDaniel</u>, 529 U.S. 473, 484 (2000) (internal quotation marks omitted), citing <u>Barefoot v. Estelle</u>, 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. 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 December 10, 2009, to file a Motion for Certificate of Appealability and Brief in support;
- 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 deadline in this case with the following text: December 10, 2009: check for filing of Motion for Certificate of Appealability.

DATED this 12<sup>th</sup> day of November, 2009.

BY THE COURT:

s/Laurie Smith Camp United States District Judge

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