

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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PS

SHAWN GREEN,

Plaintiff,

-v-

DONALD G. UHLER, Superintendent of  
Upstate Correctional Facility,

Defendant.

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16-CV-6168CJS  
ORDER

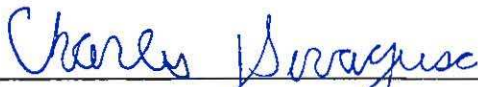
Plaintiff, Shawn Green, has filed a motion requesting a certificate of appealability from this Court's Order recharacterizing his action and denying him permission to proceed *in forma pauperis* because he has three times brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted. 28 U.S.C. § 1915(g). (Docket No. 5). For the reasons stated below, Plaintiff's application is denied.

Plaintiff, acting *pro se*, filed an action seeking relief pursuant to 28 U.S.C. § 2254, alleging that his disciplinary punishment while incarcerated in Upstate Correctional Facility was unconstitutionally obtained, as set forth more precisely in the Petition (Docket No. 1). Plaintiff also requested permission to proceed *in forma pauperis* (Docket No. 2). This Court determined that the action should have been brought under 42 U.S.C. § 1983, and not 28 U.S.C. § 2254, see *Chambers v. U.S.*, 106 F.3d 472, 475 (2d Cir.1997) (*pro se* petitions should be characterized according to the relief sought, and not the label given to them by *pro se* prisoners unlearned in the law). Plaintiff was therefore directed to show cause why the Petition should not be recharacterized as a civil action under 42 U.S.C. § 1983. (Docket No. 3). Plaintiff filed a response, relying in part on the fact that he would be precluded from

proceeding *in forma pauperis* under 42 U.S.C. § 1983 and 28 U.S.C. § 1915(g), but not 28 U.S.C. § 2254 (Docket No. 4).

Plaintiff's current motion is plainly a request for a certificate of appealability and not a motion for reconsideration. Plaintiff expressly requests such a certificate, and argues that his claims were "debatable among jurists of reason" and not "squarely foreclosed by statute, rule, or authoritative court decision." (Docket No. 6 p. 3). For the reasons set forth in its decision (Docket No. 5), the Court finds that Plaintiff has not made a substantial showing of the denial of a constitutional right, and therefore his request for a certificate of appealability is denied. Plaintiff is granted an additional thirty (30) days from the date of this order to pay the filing fee. If the filing fee is not paid, this action is dismissed without further order of the Court.

SO ORDERED.

  
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Charles J. Siragusa  
United States District Judge

DATED: Aug 24, 2016  
Rochester, NY