

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. **07-1022**

UNITED STATES OF AMERICA

v.

JOHN GARDNER BLACK

(W.D. Pa. Crim. No. 99-cr-00203)
CRIMINAL TREATED AS CIVIL

Present: BARRY, AMBRO and FISHER, Circuit Judges

Submitted are:

- (1) By the Clerk for possible summary action pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6;
- (2) Appellant's notice of appeal, which may be construed as a request for a certificate of appealability under 28 U.S.C. § 2253(c)(1); and
- (3) Appellant's motion "to immediately set aside indictment..."

in the above captioned case.

Respectfully,

Clerk

ORDER

Appellant appeals from the District Court order denying the motion to set aside his conviction and restitution order. Appellant's motion alleged prosecutorial misconduct in the procurement of a count in the Indictment and disputed the District Court's order, entered in 2005, that denied his motion to dismiss the indictment as previously litigated. Appellant's motion attacks the underlying sentence or judgment; it thus must be construed as a motion filed under 28 U.S.C. § 2255. *Gonzalez v. Crosby*, 125 S.Ct. 2641, 2648 (2005); *Pridgen v. Shannon*, 380 F.3d 721, 727 (3rd Cir. 2004). A certificate of appealability is required to obtain review of the District Court's order denying the motion.

Appellant's request for a certificate of appealability is denied. Reasonable jurists would not debate whether the District Court was correct in denying Appellant's post-

judgment motion. See Miller-El v. Cockrell, 573 U.S. 322, 338 (2003) (citing Slack v. McDaniel, 529 U.S. 473, 484 (2000)). Appellant's first §2255 motion was denied on the merits in 2001; we declined to issue a certificate of appealability in 2002. Thus, Appellant's post-judgment motion, filed in 2006, is a second or successive §2255 motion, for which Appellant did not obtain prior authorization from this Court pursuant to 28 U.S.C. § 2244, and the District Court lacked jurisdiction to consider the motion. See Robinson v. Johnson, 313 F.3d 128, 139-140 (3rd Cir. 2002); see also 28 U.S.C. § 2244(b)(2),(3).

As we have denied the application for a certificate of appealability, we do not reach the question of summary action. Appellant's motion "to immediately set aside indictment based upon record established at District Court" is denied.

By the Court,

/s/ Thomas L. Ambro
Circuit Judge

Dated: June 20, 2007