

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALASTAIR P. SIMS,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

No. 00-4507

Filed: March 23, 2001

Before: DAUGHTREY and GILMAN, Circuit Judges;
COLLIER, District Judge.

ORDER

Alastair Sims, a federal prisoner, seeks to appeal from a district court order denying Sims a certificate of appealability in this motion to vacate sentence case. *See* 28 U.S.C. § 2255. We conclude that this court lacks jurisdiction over Sims's appeal.

* The Honorable Curtis L. Collier, United States District Judge for the Eastern District of Tennessee, sitting by designation.

On August 4, 2000, the district court entered a judgment denying Sims's motion for § 2255 relief. Sims filed a notice of appeal from the judgment, and that appeal is currently before the court docketed as Case No. 00-4081. Subsequently, the district court denied Sims's application for a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1). Sims filed a notice of appeal from this order, giving rise to the current appeal.

The proper procedure when a district court denies a certificate of appealability is for the petitioner to file a motion for a certificate of appealability before the appellate court in the appeal from the judgment denying the motion to vacate. *See* Fed. R. App. P. 22(b)(1). While this court has not ruled upon the issue of the appealability of an order denying a certificate of appealability, authority from the Ninth Circuit indicates that the order is nonappealable. *See Greenawalt v. Stewart*, 105 F.3d 1268 (9th Cir. 1997). The *Greenawalt* case arose under the law in effect before the passage of the Antiterrorism and Effective Death Penalty Act, when a petitioner was required to obtain a certificate of probable cause. The Ninth Circuit held that an order denying a certificate of probable cause was not an appealable order. *Id.* at 1272.

Upon consideration, we conclude that the rule concerning certificates of appealability should be the same as the rule governing certificates of probable cause, and we hold that an order denying a certificate of appealability is not appealable. Sims may pursue the issuance of a certificate of appealability in Case No. 00-4081.

The appeal in Case No. 00-4507 is dismissed for lack of jurisdiction.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Clerk