

THE JUDICIAL COUNCIL OF THE SEVENTH CIRCUIT
219 South Dearborn Street
Chicago, Illinois 60604

February 16, 2010

FRANK H. EASTERBROOK
Chief Judge

Nos. 07-10-90008 and -90009

IN RE COMPLAINT AGAINST TWO JUDICIAL OFFICERS

MEMORANDUM

Complainant, a state prisoner, filed a collateral attack under 28 U.S.C. §2254. The district court denied his petition. Two appellate judges concluded that complainant is not entitled to a certificate of appealability, see 28 U.S.C. §2253(c), and dismissed the appeal. Complainant contends that these judges committed misconduct by not appointing a lawyer to represent him, receiving briefs, and entertaining oral argument before making this decision.

Any complaint that is “directly related to the merits of a decision or procedural ruling” must be dismissed. 28 U.S.C. §352(b)(1)(A)(ii). See also Rule 11(c)(1)(B) of the Rules for Judicial-Conduct and Judicial-Disability proceedings. “Any allegation that calls into question the correctness of an official action of a judge ... is merits related.” Standard 2 for Assessing Compliance with the Act, *Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice* 145 (2006). The allegations of this complaint fit that description. A decision not to issue a certificate of appealability relates to the merits, and a decision to resolve that question summarily is a procedural ruling. The proper way to obtain further review is by petition for rehearing or certiorari, not by a complaint under the 1980 Act.

What is more, the subject judges acted properly. A request for a certificate of appealability proceeds by motion. See Fed. R. App. P. 22(b); Seventh Circuit Operating Procedure 1(a)(1). Briefs and oral argument are appropriate only after a certificate has been issued; the certificate is a screening device to determine whether the full appellate process will be employed. Prisoners seeking collateral relief in non-capital cases are not entitled to counsel at public expense, at any stage of the proceeding. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987). Whether to appoint counsel is a matter for sound judicial discretion; how judges exercise that discretion is outside the scope of the 1980 Act.