

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETER E. HENDRICKSON,)
)
 Petitioner-Appellant,)
)
 v.)
)
 UNITED STATES OF AMERICA,)
)
 Respondent-Appellee.)

FILED
Dec 23, 2013
DEBORAH S. HUNT, Clerk

ORDER

Peter Hendrickson, a former federal prisoner, appeals pro se a district court judgment denying his motion construed as having been brought under 28 U.S.C. § 2255. We construe Hendrickson’s notice of appeal as an application for a certificate of appealability. Fed. R. App. P. 22(b)(1).

A jury found Hendrickson guilty of ten counts of filing a false document with the Internal Revenue Service (IRS) in violation of 26 U.S.C. § 7206(1). The district court sentenced him to thirty-three months of imprisonment. This court affirmed Hendrickson’s convictions, vacated his sentence, and remanded the case for resentencing. *United States v. Hendrickson*, 460 F. App’x 516, 520 (6th Cir.), *cert. denied*, 132 S. Ct. 2754 (2012). Upon remand, the district court resentedenced Hendrickson to twenty-seven months of imprisonment. Hendrickson completed his term of imprisonment on June 13, 2012, and began serving a one-year term of supervised release.

In his timely motion to vacate sentence, Hendrickson claimed that: (1) his conviction and sentence are invalid because the government failed to allege and prove that he is a “person” as that term is used in 26 U.S.C. § 7206(1) and defined in 26 U.S.C. § 7343; and (2) the government is foreclosed from establishing that he willfully filed false tax returns in violation of 26 U.S.C. § 7206(1). The district court denied Hendrickson’s motion and found no grounds upon which to grant him a certificate of appealability.

Hendrickson's application for a certificate of appealability is denied because he has not made a substantial showing of the denial of a federal constitutional right, *see* 28 U.S.C. § 2253(c)(2); *Tennard v. Dretke*, 542 U.S. 274, 282 (2004), by "demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)); *see also Tennard*, 542 U.S. at 282.

When the district court denies a habeas petition on procedural grounds . . . , a [certificate of appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack, 529 U.S. at 484. Hendrickson has not met this burden.

Reasonable jurists could not disagree with the district court's rejection of Hendrickson's first claim on the merits. Section 7206, a perjury statute that criminalizes lying on any document filed with the IRS, provides that: "Any person who . . . willfully makes and subscribes to any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony . . ." The term "person" as used in the tax code has been consistently, and plainly, defined as any individual. 26 U.S.C. § 7701(a)(1); *United States v. Maggi*, No. 98-5570, 1999 WL 96651, at *2 (6th Cir. Feb. 5, 1999).

Nor could reasonable jurists disagree with the district court's conclusion that Hendrickson's second claim is procedurally defaulted. Hendrickson contends that inaction by the IRS, in the failing to create a substitute tax return for him, was tantamount to an admission that the agency did not view his tax returns as false. According to Hendrickson, that admission precludes the government from establishing that he willfully filed false tax returns. Hendrickson did not raise this claim on direct appeal. Thus, Hendrickson is procedurally barred from raising it in his § 2255 motion, absent a showing of cause and prejudice. *See Bousley v. United States*, 523 U.S. 614, 621 (1998); *Peveler*

v. United States, 269 F.3d 693, 698 (6th Cir. 2001). Hendrickson offers no reason as to why he failed to raise this claim during his initial proceedings or on appeal. Because Hendrickson failed to establish cause, it is unnecessary to determine whether he was prejudiced by the alleged violation. *See Bousley*, 523 U.S. at 623. In addition, Hendrickson's case does not fit within a narrow class of cases permitting review because he has not submitted new evidence showing that a constitutional violation has probably resulted in a conviction of one who is actually innocent. *See id.* at 622-23. The statutory provision upon which Hendrickson relies, 26 U.S.C. § 6020(b)(1), does not give rise to a mandatory duty for the IRS to prepare a substitute return, *Maggi*, 1999 WL 96651, at *2, and Hendrickson cites to no arguably persuasive authority for the proposition that a grant of authority to the IRS under § 6020(b)(1) to prepare a substitute return excuses him from the criminal liability imposed under § 7206(1) for willfully filing a false return.

Accordingly, Hendrickson's application for a certificate of appealability is denied.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Debra L. Smith", is written in a cursive style.

Clerk