

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

LUTHER LEON AUSTIN,

Petitioner,

-vs-

Case No. 2:07-cv-616-FtM-29DNF

Case No. 2:98-cr-127-FTM-29DNF

UNITED STATES OF AMERICA,

Respondent.

OPINION AND ORDER

This matter comes before the Court on Petitioner's Request for Certificate of Appealability (Doc. #18) and Affidavit or Declaration in Support of Motion for Leave to Proceed *In Forma Pauperis* (Doc. #19), construed as a motion to proceed *in forma pauperis*, both filed on March 19, 2009. The motions were filed in conjunction with petitioner's Notice of Appeal (Doc. #17) filed on March 16, 2009.

Under 28 U.S.C. § 2253(c)(1), an appeal cannot be taken from a final order in a habeas proceeding unless a certificate of appealability issues. The decision to issue a certificate of appealability requires "an overview of the claims in the habeas petition and a general assessment of their merits." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). Specifically, where a district court has rejected a prisoner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists

would find the district court's assessment of the constitutional claims debatable or wrong. See Slack v. McDaniel, 529 U.S. 473, 484 (2000); Peoples v. Haley, 227 F.3d 1342 (11th Cir. 2000). When the district court has rejected a claim on procedural grounds, the petitioner must show 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; Franklin v. Hightower, 215 F.3d 1196, 1199 (11th Cir. 2000) (per curiam), cert. denied, 121 S. Ct. 1738 (2001). "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims." Miller-El v. Cockrell, 537 U.S. at 336.

On February 12, 2009, the Court entered an Opinion and Order (Doc. #14) dismissing the Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2241 to the extent it challenged the sentence based upon an improper delegation as to restitution. On March 3, 2009, petitioner filed a motion seeking reconsideration. On March 5, 2009, the Court issued an Order (Doc. #16) denying reconsideration. Upon review, the Court finds that petitioner has failed to show that jurists of reason would find the Court's assessment of the constitutional claim debatable or wrong or that the Court was incorrect in its procedural rulings. As a result, the motion to proceed *in forma pauperis* will also be denied.


Accordingly, it is now

ORDERED:

1. Petitioner's Request for Certificate of Appealability (Doc. #18) is **DENIED**.

2. Petitioner's Affidavit or Declaration in Support of Motion for Leave to Proceed *In Forma Pauperis* (Doc. #19), construed as a motion to proceed *in forma pauperis*, is **DENIED**.

DONE AND ORDERED at Fort Myers, Florida, this 19th day of March, 2009.



JOHN E. STEELE
United States District Judge

Copies:
All Parties of Record

United States Court of Appeals
Eleventh Circuit
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