

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

HOWARD HENRY,

Petitioner,

vs.

Case No. 2:09-cv-435-FtM-29DNF

UNITED STATES OF AMERICA,

Respondent.

OPINION AND ORDER

_____ This matter comes before the Court on petitioner's Motion for Release Pending Outcome of Habeas Petition (Doc. #11) filed on August 6, 2009. Petitioner seeks release from his term of imprisonment until his § 2255 petition is resolved. Because petitioner has failed to demonstrate an entitlement to such release, the motion is denied.

Gomez v. United States, 899 F.2d 1124 (11th Cir. 1990) sets forth the applicable standard:

A prisoner seeking release pending habeas corpus can be granted bail under two sets of circumstances: first, he must demonstrate a likelihood of success on the merits of a substantial constitutional claim; second, extraordinary and exceptional circumstances must exist which make the grant of bail necessary to preserve the effectiveness of the habeas corpus relief sought.

Gomez, 899 F.2d at 1125. Although the government's response to the § 2255 motion is not yet due, a preliminary review establishes that petitioner satisfies neither standard. The Court has already ruled against petitioner as to the issue of the guilty plea before the


magistrate judge, see Case No. 2:06-cr-121-FTM-29DNF, Doc. #276. Challenges to restitution are not cognizable in a § 2255 proceeding. Mamone v. United States, 559 F.3d 1209 (11th Cir. 2009). Petitioner's belated claim of innocence is affirmatively refuted by the facts he admitted during his guilty plea and the facts presented at his sentencing hearing. Additionally, none of his claims of ineffective assistance of counsel appear to satisfy the standard in Strickland v. Washington, 466 U.S. 668 (1984).

Accordingly, it is now

ORDERED:

Petitioner's Motion for Release Pending Outcome of Habeas Petition (Doc. #11) is **DENIED**.

DONE AND ORDERED at Fort Myers, Florida, this 12th day of August, 2009.



JOHN E. STEELE
United States District Judge

Copies:
Counsel of record
Howard Henry