

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

APR 02 2018

IN THE UNITED STATES COURT OF APPEALS

4/2/18

David J. Smith
Clerk

FOR THE ELEVENTH CIRCUIT

No. 17-14703-G

WILLIAM FOLEY MILLER,

Petitioner-

Appellant,

versus

STATE OF FLORIDA,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-

Appellees.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

William Foley Miller, a Florida prisoner, moves this Court for a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP") in order to appeal the district court's denial of his *pro se* Fed. R. Civ. P. 60(b) motion for relief from judgment with respect to the district court's denial of his 28 U.S.C. § 2254 petition for writ of habeas corpus. Miller currently is serving a life sentence after a jury convicted him of second-degree murder.

In August 2013, Miller filed a *pro se* federal habeas petition, pursuant to 28 U.S.C. § 2254, raising several claims for relief. After the state responded and Miller replied, the district court denied the § 2254 petition, in part as procedurally defaulted, and in part on the merits. The district court also denied him a COA and leave to proceed IFP on appeal. In February 2017, a

APPENDIX - "A"

single judge of this Court denied Miller's motion for a COA and denied his requests for leave to proceed IFP and appointment of counsel as moot.

In June 2017, Miller filed in the district court a motion for relief from the judgment, pursuant to Fed. R. Civ. P. 60(b). Miller asserted that the district court should reconsider its prior denial of his habeas petition for two reasons: (1) the court failed to conduct a *de novo* review of his claims and, instead, "solely relied on the findings by the state post conviction court"; and (2) the court violated his due process rights when it failed to have a magistrate judge prepare a Report and Recommendation ("R&R") to which Miller then could have objected prior to the district court's ruling. The district court denied Miller's Rule 60(b) motion and denied him a COA. The court subsequently denied him leave to proceed IFP on appeal.

A COA is required to appeal the denial of Miller's Rule 60(b) motion in his § 2254 proceeding. *See Jackson v. Crosby*, 437 F.3d 1290, 1294 (11th Cir. 2006) (stating that a COA is required for an appeal of the denial of a Rule 60(b) motion in a habeas proceeding). To merit a COA, Miller must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Miller is unable to make that showing.

First, he claimed that the district court failed to conduct a *de novo* review of his claims and, instead, deferred to the state post-conviction court's resolution of the claims, but this type of deferential review is exactly what § 2254 contemplates. *See* 28 U.S.C. § 2254(d) (where a state court has adjudicated a claim on the merits, a federal court may grant habeas relief only if the decision of the state court (1) "was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court

proceeding"); *Cullen v. Pinholster*, 563 U.S. 170, 180 (2011) ("This is a difficult to meet, and highly deferential standard for evaluating state-court rulings, which demands that the state-court decisions be given the benefit of the doubt.").

Second, he claimed that the district court was required to have a magistrate judge prepare an R&R to which he could then object, but, as the district court noted, it merely was permitted, not required, to refer the case to a magistrate judge. *See* 28 U.S.C. § 636(b)(1)(B) (stating that a district court judge "may also designate a magistrate judge to . . . to submit to a judge of the court proposed findings of fact and recommendations for disposition" (emphasis added)).

Because Miller has failed to make the requisite showing, his motion for a COA is DENIED. His motion for leave to proceed IFP is DENIED AS MOOT.

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-14703-G

WILLIAM FOLEY MILLER,

Petitioner-Appellant,

versus

STATE OF FLORIDA,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

Before: JULIE CARNES and NEWSOM, Circuit Judges.

BY THE COURT:

William Foley Miller has filed a motion for reconsideration of this Court's order dated April 2, 2018, denying his motions for a certificate of appealability and leave to proceed on appeal *in forma pauperis*. Because Miller has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motions, this motion for reconsideration is DENIED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

WILLIAM FOLEY MILLER,

Petitioner,

v.

Case No: 2:13-cv-610-FtM-38MRM

STATE OF FLORIDA and FLORIDA
ATTORNEY GENERAL,

Respondents.

ORDER¹

Petitioner appeals this Court's October 4, 2017 Order denying reconsideration of the order denying his petition under 28 U.S.C. § 2254 and moves for leave to appeal *in forma pauperis* (Doc. 30). Petitioner identifies no meritorious issues on appeal. Under Rule 24(a) of the Federal Rules of Appellate Procedure, Petitioner's appeal is not taken in good faith. See *McIntosh v. United States Parole Comm'n*, 115 F.3d 809, 812 (10th Cir. 1997) (The petitioner must demonstrate "the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal.").

ACCORDINGLY, it is hereby

ORDERED:

¹ Disclaimer: Documents filed in CM/ECF may contain hyperlinks to other documents or Web sites. These hyperlinks are provided only for users' convenience. Users are cautioned that hyperlinked documents in CM/ECF are subject to PACER fees. By allowing hyperlinks to other Web sites, this court does not endorse, recommend, approve, or guarantee any third parties or the services or products they provide on their Web sites. Likewise, the court has no agreements with any of these third parties or their Web sites. The court accepts no responsibility for the availability or functionality of any hyperlink. Thus, the fact that a hyperlink ceases to work or directs the user to some other site does not affect the opinion of the court.

Petitioner's motion for leave to appeal *in forma pauperis* (Doc. 30) is **DENIED**.

Unless Petitioner moves in the Eleventh Circuit Court of Appeals to proceed *in forma pauperis* and the motion is granted, Petitioner must pay the \$505 appellate filing and docketing fees.

DONE and **ORDERED** in Fort Myers, Florida on this 6th day of November, 2017.


Sheri Polster Chappell
SHERI POLSTER CHAPPELL
UNITED STATES DISTRICT JUDGE

SA: OrlP-4

Copies: All Parties of Record

Eleventh Circuit Court of Appeals