

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14848-C

MAURICE D. JOSEPH,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF
CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

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

Before: WILSON and PRYOR, Circuit Judges.

BY THE COURT:

Maurice Joseph has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated April 5, 2019, denying his motion for a certificate of appealability to appeal the denial of his 28 U.S.C. 2254 petition and denying as moot his motion for leave to proceed *in forma pauperis*. Because Joseph has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motion, this motion for reconsideration is DENIED.

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ORDER:

Maurice Joseph moves for a certificate of appealability ("COA"), in order to appeal the denial of his 28 U.S.C. § 2254 habeas corpus petition and subsequent Fed. R. Civ. P. 59(e) motion to alter or amend judgment. To merit a COA, Joseph must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. See 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Joseph's motion for a COA is DENIED because he failed to make the requisite showing.

Joseph's motion for leave to proceed *in forma pauperis* is DENIED AS MOOT.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MAURICE D. JOSEPH,

Petitioner,

v.

Case No. 8:16-cv-3415-T-33SPF

SECRETARY, DEPARTMENT
OF CORRECTIONS,

Respondent.

ORDER

Petitioner Maurice D. Joseph timely filed a Motion to Alter or Amend Judgment under Rule 59(e), Federal Rules of Civil Procedure. (Doc. 33). He seeks to alter or amend the judgment entered when this Court denied his amended petition for writ of habeas corpus under 28 U.S.C. § 2254. (Docs. 31, 32). Respondent opposes Joseph's motion. (Doc. 34).

Rule 59(e) authorizes a motion to alter or amend a judgment after the judgment's entry. "The only grounds for granting [a Rule 59] motion are newly-discovered evidence or manifest errors of law or fact." *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (quoting *In re Kellogg*, 197 F.3d 1116, 1119 (11th Cir. 1999)). The decision to alter or amend a judgment pursuant to Rule 59(e) "is committed to the sound discretion of the district judge." *Am. Home Assur. Co. v. Glenn Estess & Assocs., Inc.*, 763 F.2d 1237, 1238-39 (11th Cir. 1985). "[A] Rule 59(e) motion [cannot be used] to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of

judgment." *Arthur*, 500 F.3d at 1343 (quoting *Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005)).

First, Joseph addresses an argument raised in Ground One of his amended habeas petition. He alleged that the trial court erred in denying his motion to suppress when police unlawfully taped a conversation between Joseph and a detective without Joseph's knowledge. This Court found that Joseph failed to exhaust this claim by raising it in the state court and that it was procedurally defaulted. (Doc. 31, pp. 7-8). Joseph now argues that this Court should have considered the default excused because he met the cause and prejudice exception under *Martinez v. Ryan*, 566 U.S. 1 (2012).

However, Joseph did not argue in either his amended petition or his reply that *Martinez* applied to overcome the default of his trial court error claim. (Doc. 7, pp. 4-5; Doc. 29, pp. 13-25). Because this matter could have been raised in either pleading, it does not provide a basis for Rule 59(e) relief. *Arthur*, 500 F.3d at 1343. Additionally, *Martinez* is inapplicable to Joseph's defaulted trial court error claim. *Martinez* only concerns defaulted claims of ineffective assistance of trial counsel. 566 U.S. at 16.

Next, Joseph addresses claims of ineffective assistance of trial counsel that this Court considered under Ground Five of the amended petition. Joseph alleged that trial counsel was ineffective in failing to argue that the detective violated federal and state law concerning the interception of communications. Joseph raised these claims for the first time in his reply to the response. This Court found that Joseph was barred from raising new claims in the reply. (Doc. 31, pp. 12-13, 16). This Court also determined that the claims were unexhausted because Joseph did not raise them in state court, and that Joseph had not argued or established the applicability of an exception to excuse the

resulting default. (*Id.*).

Joseph now contends that he met the cause and prejudice exception under *Martinez*, and that this Court therefore should have considered the merits of the ineffective assistance claims. However, Joseph cannot overcome the prohibition on bringing new claims in his reply. See *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008) ("We do not address arguments raised for the first time in a *pro se* litigant's reply brief. *Lovett v. Ray*, 327 F.3d 1181, 1183 (11th Cir. 2003). Timson, thus, has abandoned this issue."). Furthermore, Joseph did not argue that the claims should be considered under *Martinez*. (Doc. 29, pp. 31-53). And because he could have raised the *Martinez* argument earlier, it cannot provide a basis for relief under Rule 59(e). *Arthur*, 500 F.3d at 1343. Accordingly, Joseph has not demonstrated any manifest error of law or fact in this Court's denial of his amended habeas petition. Finally, to the extent Joseph may otherwise intend to reargue the merits of his amended habeas petition, he may not do so in his Rule 59(e) motion. See *id.*

It is therefore

ORDERED that Joseph's Motion to Alter or Amend Judgment (Doc. 33) is **DENIED**. The Court's Order denying his amended habeas petition denied a certificate of appealability. (Doc. 31, pp. 21-22). Joseph does not demonstrate that reasonable jurists would find the Court's procedural ruling or assessment of the constitutional claims debatable or wrong, see *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that "the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). Consequently, a certificate of appealability is **DENIED**. Because Joseph is not

entitled to a certificate of appealability, he is not entitled to appeal *in forma pauperis*.

ORDERED at Tampa, Florida, on October 22, 2018.

Virginia M. Hernandez Covington
VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

Maurice D. Joseph
Counsel Of Record

**Additional material
from this filing is
available in the
Clerk's Office.**