

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-50911



A True Copy
Certified order issued Mar 31, 2020

John W. Cuyler
Clerk, U.S. Court of Appeals, Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

v.

MICHAEL JAVIER OTTOGALLI, also known as Michael J. Ottogalli, also
known as Michael Ottogalli,

Defendant–Appellant.

Appeal from the United States District Court
for the Western District of Texas

O R D E R:

Michael Javier Ottogalli, federal prisoner # 67985-380, moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct the sentence imposed following his guilty plea conviction for one count of distribution of child pornography, a violation of 18 U.S.C. § 2252A(a)(2) and (b)(1). He also moves for leave to proceed in forma pauperis (IFP). Ottogalli requests a COA with respect to his claims of ineffective assistance of trial counsel, based on counsel's failure to (1) properly object to the district court's reliance on unreliable evidence during sentencing; (2) properly object to the U.S.S.G. § 2G2.2(b)(4) enhancement; (3) object when the district court did not comply with Rule 11(b)(1)(N) of the Federal Rules of Criminal Procedure; (4) properly object to

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the U.S.S.G. § 2G2.2(b)(3)(B) enhancement; and (5) properly object to the U.S.S.G. § 3B1.3 enhancement. He fails to raise multiple claims he addressed in his § 2255 motion and has thus abandoned any challenge he might have raised respecting those claims. *See Hughes v. Johnson*, 191 F.3d 607, 612-13 (5th Cir. 1999). Additionally, Ottogalli asks us to review the Rule 11 issue presented in his § 2255 motion, “as well as the various grounds raised in his [§] 2255 motion that constitute the overall effect of ineffective assistance of counsel.” But we will not consider issues incorporated from pleadings before the district court. *See Summers v. Dretke*, 431 F.3d 861, 870 (5th Cir. 2005).

Ottogalli is not entitled to a COA because he fails to show 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). Accordingly, his motion is DENIED. His motion to proceed IFP is also DENIED as moot.



DON R. WILLETT
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-50911

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

v.

MICHAEL JAVIER OTTOGALLI, also known as Michael J. Ottogalli, also
known as Michael Ottogalli,

Defendant–Appellant.

Appeal from the United States District Court
for the Western District of Texas

Before HIGGINBOTHAM, SOUTHWICK, and WILLETT, Circuit Judges.

PER CURIAM:

A member of this panel previously denied Appellant’s motion for a certificate of appealability. The panel has considered Appellant’s motion for reconsideration. IT IS ORDERED that the motion is DENIED.

Appendix A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MICHAEL JAVIER OTTOGALLI,
#67985-380,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

SA-18-CV-1058-FB
SA-16-CR-0104-FB-1

AMENDED ORDER

Before the Court is *pro se* Petitioner Michael Javier Ottogalli's motion to proceed in forma pauperis ("IFP") on appeal (ECF No. 57), wherein he requests he not be required to pay the \$505.00 filing fee required for the notice of appeal. For the reasons stated in this Court's Order denying Ottogalli's Section 2255 Motion and denying a Certificate of Appealability (ECF No. 55), Ottogalli's request to proceed IFP (ECF No. 57) is also **DENIED**.

Ottogalli's motion and appeal fail to present a good faith non-frivolous issue. Accordingly, Movant Michael Javier Ottogalli's motion to proceed IFP is **DENIED**. (ECF No. 57).

It is so ORDERED.

SIGNED this 15th day of November, 2019.


FRED BIERY
UNITED STATES DISTRICT JUDGE

Appendix C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MICHAEL JAVIER OTTOGALLI,
#67985-380,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent

SA-18-CV-1058-FB
SA-16-CR-0104-FB-1

ORDER

Before the Court is Movant Michael Javier Ottogalli's *pro se* Motion to Proceed in Forma Pauperis ("IFP") On Appeal, executed on September 25, 2019. (ECF No. 57). For the reasons stated in this Court's Order denying Ottogalli's section 2255 Motion and denying a Certificate of Appealability (ECF No. 55), Ottogalli's Motion to Proceed IFP (ECF No. 57) is also **DENIED**.

Ottogalli's motion and appeal fail to present a "good faith" non-frivolous issue as required by 28 U.S.C. § 1915(a)(3) to proceed IFP on appeal. *See Coppedge v. U.S.*, 369 U.S. 438, 445 (1962). Further, Ottogalli's request to proceed IFP fails to comply with 28 U.S.C. § 1915(a)(1). Accordingly, Movant Michael Javier Ottogalli's Motion to Proceed IFP is **DENIED**. (ECF No. 57).

Although the Court denies Ottogalli's Motion to Proceed IFP, the Court determines Ottogalli would be required to pay an initial partial filing fee of \$18.70 which represents 20% of Ottogalli's six-month average monthly deposits as shown on the inmate account statement Ottogalli submitted to the Court.

It is so ORDERED.

SIGNED this 14th day of November, 2019.


FRED BIERY
UNITED STATES DISTRICT JUDGE

Appendix D

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CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY LGZVR
DEPUTY

Appendix E