UNITED STATES DISTRICT COURT
_____ DISTRICT OF FLORIDA
_____ DIVISION

_____,
Petitioner,

vs. CASE NO. _____

SECRETARY, FLORIDA DEPARTMENT
OF CORRECTIONS, ATTORNEY GENERAL,
STATE OF FLORIDA,
Respondents.
_____/

MOTION FOR CERTIFICATE OF APPEALABILITY
AND MOTION FOR IN FORMA PAUPERIS FOR APPEAL

COMES NOW the Petitioner, _____, and respectfully moves this Court to issue a Certificate of Appealability and to order him insolvent for costs associated with this appeal.

In support thereof the Petitioner does state:

I. CERTIFICATE OF APPEALABILITY

1. The Petitioner moves this Honorable Court to issue the Certificate of Appealability pursuant to Fla.R.App.P. 22(b) and 28 U.S.C. § 2253.

2. Simultaneously herewith the Petitioner has filed his timely Notice of Appeal of this Court's final order denying the Petition for Writ of Habeas Corpus taken pursuant to 28 U.S.C. § 2254 rendered on _____, 20___.

3. It is necessary for the Petitioner to establish a substantial showing of the denial of a constitutional right in order to issue the requested certificate . The standard of review for granting a "Certificate of Appealability" is set forth in Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983) which states in pertinent part:

> A certificate must issue if the appeal presents a 'question of some substance' i.e., at least one issue (1) that is 'debatable among jurists of reason'; (2) 'that a court could resolve in different manner;' (3) 'that is not squarely foreclosed by statute, rule, or authoritative court decision, or… [that is not] lacking any factual basis in the record'.

The Supreme Court admonished the lower courts that they may not deny applications solely because they have already denied the petition on the merits.

> [O]bviously, the Petitioner need not show that he should prevail on the merits. He has already failed in that endeavor.

Id., at 463 U.S. at 893 n.4 quoting *Gordon v. Willis*, 516 F.Supp. 911, 913 (N.D. Ga. 1980). Rather, a certificate must issue if the appeal presents a "question of some substance", i.e., at least a ground that meets one of the three (3) criteria set forth above.

4. More recently the United States Supreme Court clarified the requisite standard for the granting of certificates in *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 1040, 154 L.Ed.2d 931 (2003) stating:

> [W]e do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in Slack, "[W]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253 (c) is straightforward; the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 529 U.S. at 484, 120 S.Ct. 1595.

The Petitioner contends that the required standard is met so that the issues presented are adequate to warrant further proceedings , id., 123 S.Ct. 1039, as follows:

5. Therefore, the Petitioner contends that he has shown a substantial denial of a constitutional right and therefore this Court should issue the Certificate of Appealability.

II. IN FORMA PAUPERIS

6. The Petitioner also respectfully moves this Honorable Court to Order him insolvent for costs associated with this appeal pursuant to Fed.R.App.P. 24(a) and attaches hereto the required affidavit consistent with Fed.R.App.P. Form 4.

CONCLUSION

WHEREFORE, based on the foregoing, the Petitioner respectfully prays this Honorable Court to issue the Certificate of Appealability and order him insolvent for costs associated with this appeal.

Under the penalties of perjury, I declare and certify that I do understand English and that I have read the foregoing document and that the facts stated in it are true and correct.

Executed this ___ day of _____, 20___.

Respectfully submitted,

_____

_____

Petitioner, Pro Se
DC # _____

_____

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