

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION

CALVIN S. CUMMINGS,

Petitioner,

v.

Case No: 2:16-cv-319-FtM-29UAM

Case No. 2:08-CR-31-FTM-29CM

UNITED STATES OF AMERICA,

Respondent.

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**OPINION AND ORDER**

This matter comes before the Court on petitioner's Unopposed Motion to Dismiss Without Prejudice (Doc. #28) filed on February 14, 2019. Petitioner seeks to voluntarily dismiss his Motion Under 28 U.S.C. Section 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody (Cv. Doc. #1; Cr. Doc. #76) filed on April 29, 2016.

Petitioner's 2255 Motion sought to vacate his sentence in light of Johnson v. United States, 135 S. Ct. 2551 (2015). The case was stayed pending the outcome of other relevant decisions, and on January 15, 2019, the United States Supreme Court issued a decision in Stokeling v. United States, 139 S. Ct. 544 (2019), which precludes the relief sought. Petitioner agrees to the dismissal of the underlying motion, and the government does not oppose the dismissal. The Court will grant the motion to lift the stay and dismiss the case.

Accordingly, it is hereby

**ORDERED AND ADJUDGED:**

1. Petitioner's Unopposed Motion to Dismiss 28 U.S.C. § 2255 Motion Without Prejudice (Cv. Doc. #28) is **GRANTED**.
2. Petitioner's Motion Under 28 U.S.C. Section 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody (Cv. Doc. #1; Cr. Doc. #76) is **DISMISSED** without prejudice except as to the 1-year period of limitation imposed by 28 U.S.C. § 2255(f).
3. The Clerk of the Court shall enter judgment accordingly and close the civil file. The Clerk is further directed to place a copy of the civil Judgment in the criminal file.

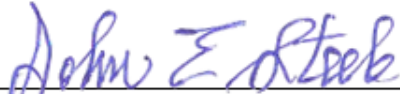
**IT IS FURTHER ORDERED:**

**A CERTIFICATE OF APPEALABILITY (COA) AND LEAVE TO APPEAL IN FORMA PAUPERIS ARE DENIED.** A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1); Harbison v. Bell, 556 U.S. 180, 183 (2009). "A [COA] may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, Petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," Tennard v. Dretke, 542 U.S. 274, 282 (2004), or that "the issues presented were adequate to deserve

encouragement to proceed further," Miller-El v. Cockrell, 537 U.S. 322, 336 (2003)(citations omitted). Petitioner has not made the requisite showing in these circumstances.

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

**DONE and ORDERED** at Fort Myers, Florida, this 19th day of February, 2019.

  
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JOHN E. STEELE  
SENIOR UNITED STATES DISTRICT JUDGE

Copies:  
Petitioner  
AUSA