

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**v.**

**KENNEDY M. RUSSELL,**

**Defendant.**

**No. 10-cr-30196-DRH**

**MEMORANDUM and ORDER**

**HERNDON, Chief Judge:**

Pending before the Court is Russell's September 24, 2013 notice of appeal (Doc. 106) which contains a request for certificate of appealability (Doc. 107) and a request to proceed in forma pauperis on appeal (Doc. 108). In this Notice of Appeal, Russell states that he is appealing "the Trial Court's, Final Judgment, in error, in imposition of 'restitution' in the above described matter."<sup>1</sup> Based on the following, the Court declines to issue a certificate of appealability and denies the request to proceed in forma pauperis on appeal.

As to the certificate of appealability, the Court denies the request as Russell is not entitled to one. Rule 11(a) of the Rules governing habeas corpus proceedings requires that "the district court must issue or deny a certificate of

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<sup>1</sup> The caption of the notice of appeal contains this criminal cause number and Russell's civil cause number 12-1016-DRH. Thus, the notice of appeal had to be filed in both cases.

appealability when it enters a final order adverse to the applicant.” Clearly, a certificate of appealability applies in a habeas corpus proceeding and not in a criminal matter. Furthermore, this is a criminal case wherein restitution was entered on September 9, 2011 (Doc. 61). On September 17, 2013, Russell filed a motion to reevaluate the restitution order (Doc. 104). The Court directed the government to respond to the Russell’s motion on or before October 2, 2013. Thus, the issue for restitution is not ripe for determination and there is nothing on the record to appeal.

Likewise, the Court denies the motion to proceed in forma pauperis based on the same reasoning. An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.” 28 U.S.C. §1915(a)(3). As there is nothing to appeal from, the Court **CERTIFIES** that the appeal is not taken in good faith.

Accordingly, the Court **DENIES** the motion for certificate of appealability (Doc. 107) and the motion for leave to proceed *in forma pauperis* (Doc. 108). Russell shall tender the appellate filing and docketing fee of \$455 to the Clerk of Court in this District, or he may reapply to the Seventh Circuit Court of Appeals for leave to proceed *in forma pauperis* on appeal.

**IT IS SO ORDERED.**

Signed this 25th day of September, 2013.

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David R. Herndon  
Date: 2013.09.25  
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**Chief Judge  
United States District Court**