

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

Vs.

Civil Case No. 07-4016-SAC

Criminal Case No. 03-40045-01-SAC

DALE CLAYTON,

Defendant/Movant.

MEMORANDUM AND ORDER

The case comes before the court on the movant's filing of a notice of appeal (Dk. 87) from the district court's order denying his motion for relief pursuant to 28 U.S.C. § 2255 as untimely (Dk. 86). The court construes the notice of appeal as an application for certificate of appealability ("COA"). The movant also has filed a request to proceed in forma pauperis on this appeal. (Dk. 91). Based on the movant's submitted attachments, the court finds that the appeal is taken in good faith and that the movant lacks the financial ability to pay the required fees and, therefore, grants the movant's request to proceed in forma pauperis. See *McIntosh v. United States Parole Commission*, 115 F.3d 809, 812 (10th Cir. 1997).

Because the court denied movant's § 2255 petition on procedural grounds without reaching the merits of his claims, the appellant to obtain a COA must demonstrate "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The untimeliness of the movant's petition is a plain procedural bar. The movant has not articulated any debatable ground for equitable tolling cognizable under Tenth Circuit precedent which requires more than the simple excusable neglect argued by the movant. Without this showing, the court must deny the defendant's request for a certificate of appealability.

IT IS THEREFORE ORDERED that the defendant's application for certificate of appealability (Dk. 87) is denied;

IT IS FURTHER ORDERED that the defendant's request to proceed in forma pauperis (Dk. 91) is granted.

Dated this 12th day of October, 2007, Topeka, Kansas.

s/ Sam A. Crow
Sam A. Crow, U.S. District Senior Judge