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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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8 ANDREW MACKEY,

No. C 07-4189 SI

9 Petitioner,

10 v.

**ORDER DENYING CERTIFICATE OF
APPEALABILITY AND GRANTING
LEAVE TO PROCEED *IN FORMA
PAUPERIS***

11 THOMAS HOFFMAN and DAVID RUNNELS,

12 Respondents.
13 _____/

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15 Petitioner has filed a notice of appeal and a motion for certificate of appealability pursuant to
16 28 U.S.C. § 2253(c) and Federal Rule of Appellate Procedure 22(b). (Docket Nos. 37, 40). Petitioner
17 argues that his trial counsel was ineffective in trial preparation or strategic choices, and that this Court
18 erred in denying his petition for writ of habeas corpus. This Court found that trial counsel's
19 performance was within the objective standard of reasonableness, and that in any event petitioner did
20 not show prejudice. Accordingly, this Court found that the state court's rejection of petitioner's claim
21 for ineffective assistance of counsel was not contrary to or an unreasonable application of clearly
22 established federal law as set out by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668
23 (1984).

24 Because petitioner has not demonstrated that "jurists of reason would find it debatable whether
25 the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find
26 it debatable whether the district court was correct in its procedural ruling," the request for a certificate
27 of appealability is DENIED. *Slack v. McDaniel*, 529 U.S. 473 (2000). The Clerk shall forward this
28 order to the court of appeals. See *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997).

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Petitioner has filed a motion to proceed *in forma pauperis* on appeal. The Ninth Circuit has held that “if at least one issue or claim is found to be non-frivolous, leave to proceed in forma pauperis must be granted for the case as a whole.” *Hooker v. American Airlines*, 302 F.3d 1091, 1092 (9th Cir. 2002). The Court finds that at least one claim is non-frivolous. Therefore, plaintiff’s motion to proceed *in forma pauperis* is GRANTED.

IT IS SO ORDERED.

Dated: November 13, 2012



SUSAN ILLSTON
United States District Judge