

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DESHAWN DUNDRE BROADNAX,

Petitioner.

VS.

JEFFREY BEARD, Secretary of the
California Department of Corrections
and Rehabilitation,

Respondent.

CASE NO. 12cv0560-GPC-RBB

ORDER

(1) DENYING PETITIONER'S MOTION FOR CERTIFICATE OF APPEALABILITY AND

**(2) GRANTING PETITIONER'S
MOTION TO PROCEED IN
FORMA PAUPERIS**

[Dkt. Nos. 36, 37]

Pending before the Court is Petitioner's motion for issuance of certificate of appealability and motion to proceed in forma pauperis. (Dkt. Nos. 36, 37.) For the reasons stated below, the Court DENIES Petitioner's motion for certificate of appealability and GRANTS Petitioner's motion to proceed in forma pauperis. Petitioner may seek review of the certificate of appealability decision before the U.S. Court of Appeals for the Ninth Circuit. See Fed. R. App. P. 22(b)(1).

I. Motion for Certificate of Appealability

On May 8, 2013, the Court issued an Order Denying Petitioner's Request for an Evidentiary Hearing and Petition for Writ of Habeas Corpus, and Issuing a Limited Certificate of Appealability. (Dkt. No. 32, "Order.") The Court denied Petitioner's request for an evidentiary hearing and denied the First Amended

1 Petition for a writ of habeas corpus as to all of Petitioner's claims that: (1) the use of
2 California Criminal Jury Instruction No. 362 at his trial violated his constitutional
3 rights ("Claim One"); (2) the trial court erred in denying his amended motion for a
4 new trial ("Claim Two"); (3) Petitioner's right to due process under the Fourteenth
5 Amendment was violated because of insufficient evidence or inadequate jury
6 instructions ("Claim Three"); and (4) Petitioner's request for an evidentiary hearing
7 on a Brady claim ("Claim Four"). (*Id.*) The Court issued a certificate of
8 appealability limited to Claim Two, and declined to issue a certificate of
9 appealability as to all other claims. (Order at 18, citing Lambright v. Stewart, 220
10 F.3d 1022, 1025 (9th Cir. 2000)).

11 On June 26, 2013, Petitioner filed a motion for issuance of certificate of
12 appealability pursuant to 28 U.S.C. § 2253 (c)(2) and Fed. R. App. P. 22 (b)(1).
13 (Dkt. No. 36.) Petitioner requests the Court issue a certificate of appealability as to
14 Claims One and Three. (*Id.* at 1-2.) Petitioner acknowledges that the Court
15 previously issued a certificate of appealability limited to Claim Two, and argues that
16 Claims One and Three also merit the issuance of a certificate of appealability
17 because the jury instructions wrongfully deprived Petitioner of a fair trial. (*Id.*)
18 Because this Court previously denied Petitioner a certificate of appealability as to
19 Claims One and Three, the Court will construe Petitioner's motion for certificate of
20 appealability as a motion for reconsideration of the Court's prior Order.

21 A district court may reconsider an order under either Federal Rule of Civil
22 Procedure 59 (e) (motion to alter or amend a judgment) or Rule 60(b)(relief from
23 judgment). Under the local rules, a party that files a motion for reconsideration of
24 an order must set forth the material facts and circumstances surrounding the motion,
25 including any new or different facts and circumstances that are claimed to exist
26 which did not exist, or were not shown, upon such prior application. L. Civ. R. 7.1.i.
27 Motions for reconsideration offer an "extraordinary remedy, to be used sparingly in
28 the interests of finality and conservation of judicial resources." Carroll v. Nakatani,

1 342 F.3d 934, 945 (9th Cir.2003). Reconsideration is appropriate if the district
2 court (1) is presented with newly discovered evidence, (2) committed clear error or
3 the initial decision was manifestly unjust, or (3) if there is an intervening change in
4 controlling law. Sch. Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc., 5 F.3d
5 1255, 1263 (9th Cir. 1993).

6 Other than conclusory or unsupported allegations, Petitioner has failed to
7 advance any arguments in his request for a certificate of appealability which shows
8 any newly discovered evidence or that this Court erred in denying the petition for
9 writ of habeas corpus and in declining to issue a certificate of appealability. As
10 Petitioner merely presents issues which were already considered and ruled upon by
11 this Court, Petitioner's request for reconsideration is **DENIED**. The Court therefore
12 declines to issue a certificate of appealability as to Claims One and Three. This
13 decision does not alter in any way the Court's prior Order issuing a certificate of
14 appealability limited to Claim Two. (See Dkt. No. 32.)

15 **II. Motion to Proceed In Forma Pauperis**

16 On June 26, 2013, Petitioner filed a motion to proceed in forma pauperis
17 ("IFP"). (Dkt. No. 37.) Previously, this Court granted Petitioner's application to
18 proceed in forma pauperis. (See Dkt. No. 7.)

19 Pursuant to Fed. R. App. P. 24, a petitioner may "proceed on appeal in forma
20 pauperis without further authorization," unless the district court "certifies that the
21 appeal is not taken in good faith or finds that the party is not otherwise entitled to
22 proceed in forma pauperis," or a statute provides otherwise. Fed. R. App. 24(3). The
23 Ninth Circuit has construed "not taken in good faith" to mean frivolous. See Hooker
24 v. American Airlines, 302 F.3d 1091, 1092 (9th Cir.2002) (stating that "[i]f at least
25 one issue or claim is found to be non-frivolous, leave to proceed in forma pauperis
26 on appeal must be granted for the case as a whole"). An issue is "frivolous" if it has
27 "no arguable basis in fact or law." See O'Loughlin v. Doe, 920 F.2d 614, 617 (9th
28 Cir.1990) (internal citation and quotation omitted).

1 Here, Petitioner has submitted a financial affidavit in support of his IFP
2 application. (Dkt. No. 37.) The application shows he has \$0.00 on account at the
3 California correctional institution in which he is presently confined. (*Id.*) Thus,
4 Petitioner cannot afford the filing fee. Upon review of Petitioner's notice of appeal,
5 the Court finds that Petitioner has not claimed an entitlement to redress, nor set
6 forth the issues that he intends to present on appeal. (Dkt. No. 35.) However,
7 construing his submissions liberally, it appears Petitioner seeks to appeal the
8 aforementioned portion of the Court's May 8, 2013 Order declining to issue a
9 certificate of appealability. Petitioner filed the Notice of Appeal along with the
10 pending motion for certificate of appealability and motion to proceed in forma
11 pauperis. (Dkt. No. 35, "Please find enclosed an original and two copies for the
12 Court of the Notice of Appeal in the above-entitled matter. Also, a Declaration in
13 Support of Request to Proceed Without Prepayment of Filing Fees and Certificate of
14 Appealability.") Pursuant to Fed. R. App. P. 22, "If the district judge has denied the
15 certificate [of appealability], the applicant may request a circuit judge to issue it."
16 Fed. R. App. P. 22(b)(1). Although the Court construed Petitioner's motion for
17 certificate of appealability as a motion for reconsideration, Petitioner may seek
18 appellate review of the decision. Thus, the Court concludes that Petitioner's appeal
19 is not frivolous.

20 Accordingly, the Court finds no reason to deny Petitioner's ability to continue
21 to proceed in forma pauperis. The Court therefore **GRANTS** Petitioner's
22 application to proceed in forma pauperis.

23 **IT IS SO ORDERED.**

24
25 DATED: September 10, 2013¹

26
27 
HON. GONZALO P. CURIEL
United States District Judge

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¹Due to clerical error, this Order was signed 9-10-13 but filed 1-24-14.