

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CARLOS D. SIMMONS,

Petitioner,

v.

CASE NO. 09-CV-13131

HON. GEORGE CARAM STEEH

CARMEN PALMER,

Respondent.

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ORDER ACCEPTING MAGISTRATE JUDGE'S REPORT
AND RECOMMENDATION, (#15) AND DENYING CERTIFICATE OF APPEALABILITY

Petitioner Carlos Simmons, a prisoner currently incarcerated at the Michigan Reformatory in Ionia, Michigan, was convicted of three counts of first degree criminal sexual conduct and one count of unarmed robbery. He appealed as of right to the Michigan Court of Appeals, raising six claims, including the four claims raised here. The court of appeals found no merit to these four claims. The petitioner sought leave to appeal to the Michigan Supreme Court. The Michigan Supreme Court denied petitioner's application for leave to appeal. On August 10, 2009, petitioner filed this pro se application for a writ of habeas corpus, arguing the four claims described below:

1) the trial court erred in denying petitioner's motion to suppress photographic lineup identification evidence because the lineup was conducted in violation of petitioner's right to counsel;

2) the trial court erred in admitting references to petitioner's other alleged rapes;

3) the trial court erred in scoring 50 points for OV 7 because there was no

evidence of sadism or torture; and

4) the trial court violated petitioner's rights by increasing his sentence based on facts that were never found by a jury beyond a reasonable doubt.

Respondent filed an answer to the petition, and petitioner filed a reply. On June 15, 2010, the magistrate judge filed a report and recommendation. The magistrate judge recommends denying petitioner's application for a writ of habeas corpus.

Petitioner filed his objection on June 28, 2010. However, petitioner's objection and his original brief appear to be essentially the same, except for the addition of one paragraph raising a new argument on the photographic lineup issue. As to all issues except the new photographic lineup issue, petitioner failed to file "specific objections" to the magistrate's report and recommendation and thus waived any further right of appeal. As to petitioner's claim that his right to counsel was violated by the photographic lineup, the magistrate judge correctly found that the right to counsel had not yet attached at the time of the photographic lineup. Petitioner's new argument on the same issue challenges the finding by the court of appeals that any error in admitting the identification was harmless. However, the finding by the court of appeals was an alternate finding. Because the court agrees with the magistrate judge's finding that the right to counsel had not yet attached at the time of the lineup, the court need not address petitioner's new argument. Moreover, petitioner has waived the argument by not raising it before the magistrate judge.

For the reasons stated above, the court hereby ACCEPTS and ADOPTS the magistrate's report and recommendation as its findings and conclusions in this matter. Petitioner's application for writ of habeas corpus is DENIED.

In the event that petitioner appeals this order, he must obtain a certificate of appealability. The court may issue a certificate of appealability if the petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). This court finds that petitioner has not made a substantial showing of the denial of a federal right. Therefore, the court finds that a certificate of appealability is not warranted.

SO ORDERED.

S/George Caram Steeh
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

Dated: December 1, 2010

CERTIFICATE OF SERVICE

Copies of this Order were served on the attorneys of record on December 1, 2010, by electronic and/or ordinary mail and also to Carlos D. Simmons #214572, Michigan Reformatory, 1342 West Main Street, Ionia, MI 48846.

S/Josephine Chaffee
Secretary/Deputy Clerk