

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PERRY R. SILVERMAN,

Petitioner,

CASE NO. 2:07-cv-1233
JUDGE SMITH
MAGISTRATE JUDGE ABEL

v.

TIMOTHY BRUNSMAN, Warden,

Respondent.

OPINION AND ORDER

On August 19, 2009, final judgment was entered dismissing the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. 2254. This matter is before the Court on petitioner's September 18, 2009, notice of appeal, request for a certificate of appealability, and request to proceed *in forma pauperis* on appeal. For the reasons that follow, petitioner's request for a certificate of appealability, Doc. No. 35, is **DENIED**. His request to proceed *in forma pauperis* on appeal, Doc. No. 32, likewise is **DENIED**.

In this habeas corpus petition, petitioner asserts:

1. Petitioner's convictions violated his Fourteenth Amendment right to due process of law because they were not supported by sufficient evidence to enable a rational trier of fact to find guilt beyond a reasonable doubt.
2. The trial court violated the petitioner's Fourteenth Amendment right to due process of law by admitting prejudicial and inadmissible lay opinion testimony and unauthenticated documents into evidence that deprived the petitioner of a fair trial.
3. The petitioner was deprived of his Sixth Amendment rights

by the ineffective assistance of counsel, and by the trial court's refusal to grant petitioner a continuance so that he could replace said counsel.

4. The trial court imposed non-minimum and consecutive prison sentences upon the petitioner that violated his Fourteenth Amendment right to due process of law and violated Eighth Amendment prohibitions against cruel and unusual punishment.

5. The petitioner's Fourteenth Amendment right to equal protection of the law has been violated by the statutory classifications under which judicial release eligibility is granted to offenders serving non-mandatory prison terms of ten (10) years or less, but is denied to offenders serving non-mandatory prison terms of more than ten (10) years.

On August 19, 2009, the Court dismissed portions of claims two, three, four, and five as procedurally defaulted, and the remainder of petitioner's claims on the merits.

When a claim has been denied on the merits, a certificate of appealability may issue only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). This standard is a codification of *Barefoot v. Estelle*, 463 U.S. 880 (1983). *Slack v. McDaniel*, 529 U.S. 473 (2000). To make a substantial showing of the denial of a constitutional right, a petitioner must show

that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further." *Barefoot*, 463 U.S., at 893, and n.4

Id.

Where the Court dismisses a claim on procedural grounds, a certificate of appealability

should issue when the prisoner shows, at least, 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, supra, 529 U.S. at 1595. Thus, there are two components to determining whether a certificate of appealability should issue when a claim is dismissed on procedural grounds: "one directed at the underlying constitutional claims and one directed at the district court's procedural holding." The court may first "resolve the issue whose answer is more apparent from the record and arguments." *Id.*

Petitioner has failed to establish that either that reasonable jurists would debate whether petitioner's claims should have been resolved differently or whether the Court was correct in its dismissal of petitioner's claims as procedurally defaulted. Petitioner's request for a certificate of appealability therefore is **DENIED**.

Petitioner's request for a certificate of appealability likewise is **DENIED**. Pursuant to 28 U.S.C. §1915(a)(3), an appeal may not be taken *in forma pauperis* if the appeal is not taken in good faith. Federal Rule of Appellate Procedure 24 also provides:

A party who was permitted to proceed *in forma pauperis* in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal *in forma pauperis* without further authorization, unless:

(A) the district court--before or after the notice of appeal is filed-- certifies that the appeal is not taken in good faith[.]

Fed. R. App. P. 24(a)(3)(A). In addressing this standard, another court has explained:

The good faith standard is an objective one. *Coppedge v. United States*, 369 U.S. 438, 445, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962). An appeal is not taken in good faith if the issue presented is frivolous. *Id.* Accordingly, it would be inconsistent for a

district court to determine that a complaint is too frivolous to be served, yet has sufficient merit to support an appeal *in forma pauperis*. See *Williams v. Kullman*, 722 F.2d 1048, 1050 n. 1 (2d Cir.1983).

Frazier v. Hesson, 40 F.Supp.2d 957, 967 (W.D. Tenn. 1999). However,

[t]he standard governing the issuance of a certificate of appealability is more demanding than the standard for determining whether an appeal is in good faith. *U.S. v. Cahill-Masching*, 2002 WL 15701, *3 (N.D.Ill. Jan. 4, 2002). "[T]o determine that an appeal is in good faith, a court need only find that a reasonable person could suppose that the appeal has some merit." *Walker v. O'Brien*, 216 F.3d 626, 631 (7th Cir.2000).

Penny v. Booker, No. 05-70147, 2006 WL 2008523 (E.D. Michigan, July 17, 2006).

The Court certifies pursuant to 28 U.S.C. §1915(a)(3) that the appeal is not in good faith. Therefore, petitioner's request to proceed *in forma pauperis* on appeal, Doc. No. 32, as well as his request for a certificate of appealability, Doc. No. 35, are **DENIED**.

IT IS SO ORDERED.

 /s/ George C. Smith
GEORGE C. SMITH
United States District Judge