

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

EDWARD BERRIOS,	:	
Petitioner,	:	
	:	
v.	:	C.A. No. 19-165WES
	:	
PATRICIA COYNE-FAGUE, et al.,	:	
Respondents.	:	

**REPORT AND RECOMMENDATION**

Patricia A. Sullivan, United States Magistrate Judge

Petitioner Edward Berrios has appealed from this Court’s July 29, 2019, dismissal of his petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody. In connection with his appeal, he has asked this Court for leave to prosecute the appeal *in forma pauperis* (“IFP”), ECF No. 12; that motion has been referred to me. Because I recommend that the IFP motion be denied and that denial of IFP status may be dispositive of Petitioner’s appeal, the IFP motion is addressed by this report and recommendation. Keselica v. Wall, No. CA 07-224 ML, 2007 WL 2126518, at \*1 (D.R.I. July 23, 2007) (denial of IFP motion is functional equivalent of dismissal, so that magistrate judge should issue a report and recommendation for a final decision by the district court).

Procedurally, Petitioner’s IFP motion is controlled by Fed. R. App. P. 24(a), which requires that the applicant provide this Court with an affidavit that (i) demonstrates the party’s inability to pay in the detail prescribed by Form 4 of the Appendix of Forms; (ii) claims an entitlement to redress; and (iii) states the issues that the party intends to present on appeal. He complied with the requirement that he submit “Form 4” (Affidavit Accompanying Motion for

Permission to Appeal in Forma Pauperis) and he attached a copy of his inmate account summary, demonstrating his inability to pay. However, Petitioner left blank the portion of the form which states “[m]y issues on appeal are . . .,” ECF No. 12 at 1, and he did not otherwise state the issues he intends to present on appeal or identify any claims of entitlement to redress. Thus, I do not find that Petitioner has cleared the procedural bar in this instance.

Substantially, Petitioner’s IFP motion is doomed by Chief Judge Smith’s determination in his July 29, 2019, memorandum and order that Petitioner’s petition is without merit, culminating in the finding that the case is not appropriate for the issuance of a certificate of appealability. ECF No. 6 at 11-12 (“Pursuant to Rule 11(a) of the Rules Governing Section 2254 Proceedings in the United States District Courts, this Court hereby finds that this case is not appropriate for the issuance of a certificate of appealability (COA) because Berrios has failed to make a substantial showing of the denial of a constitutional right as to any claim, as required by 28 U.S.C. § 2253(c)(2).”) (emphasis in original). Section 1915 mandates that “[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.” 28 U.S.C. § 1915(a)(3); see Fed. R. App. P. 24(a) (“party . . . may proceed on appeal in forma pauperis . . . unless: (A) the district court . . . certifies that the appeal is not taken in good faith”).

Accordingly, I recommend that the Court certify that this appeal is not taken in good faith. United States v. Graham, No. CR 13-132-01-ML, 2014 WL 468969, at \*1 (D.R.I. Feb. 6, 2014). If this recommendation is adopted, I further recommend that Petitioner be denied IFP status. Id. (good faith standard is objective; appeal not in good faith if it seeks review of issues that are frivolous).

Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days of its receipt. See Fed. R. Civ. P.

72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan  
PATRICIA A. SULLIVAN  
United States Magistrate Judge  
October 3, 2019