

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

February 10, 2006

Elisabeth A. Shumaker
Clerk of Court

DANIEL O'NEILL,

Petitioner-Appellant,

v.

JAMES JANECKA, Warden;
ATTORNEY GENERAL FOR THE
STATE OF NEW MEXICO,

Respondents-Appellees.

No. 05-2213

(D.C. No. CIV-04-918 MCA/DJS)

(D. New Mex.)

ORDER

Before **HENRY, McKAY, and EBEL**, Circuit Judges.

Mr. O'Neill is currently serving a thirty-three year sentence in New Mexico state prison to be followed by two years parole. In his 28 U.S.C. § 2254 petition, he alleges ineffective assistance of counsel and that the state failed to properly consider his post-conviction motions. The magistrate judge recommended to the district court that Mr. O'Neill's petition be dismissed due to failure to exhaust the available state law remedies and because the petition was time-barred. Mr. O'Neill failed to object to the magistrate judge's recommendation, and the district court adopted the recommendation and dismissed Mr. O'Neill's petition. The district court also denied Mr. O'Neill's request for a certificate of appealability.

Mr. O'Neill now appeals that dismissal to this court.

In an August 11, 2005 order from this court, we requested that in his appellate brief Mr. O'Neill discuss whether he had waived his right to appeal his petition's dismissal when he failed to object to the magistrate judge's recommendation. Mr. O'Neill did not explain his failure to timely object to the magistrate judge's recommendation. That failure to object to the magistrate's recommendation now bars him from seeking appellate review of the district court's dismissal. *See Sealock v. Colorado*, 218 F.3d 1205, 1209 (10th Cir. 2000).

To grant a certificate of appealability, Petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (1994). To meet this burden, Petitioner must demonstrate "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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation omitted).

We have carefully reviewed Mr. O'Neill's brief, the district court's disposition, the magistrate judge's recommendation, and the record on appeal. Nothing in the facts, the record on appeal, or Mr. O'Neill's filing raises an issue which meets our standard for the grant of a certificate of appealability. For

substantially the same reasons set forth by the magistrate judge and adopted by the district court in its Order and Judgment of June 20, 2005, we cannot say “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner.” *Id.*

We **DENY** Mr. O’Neill’s request for a certificate of appealability and **DISMISS** the appeal.

Entered for the Court

Monroe G. McKay
Circuit Judge