

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

RODERICK WASHINGTON,)	1:05-cv-01537-LJO-TAG-HC
)	
Petitioner,)	ORDER DENYING
v.)	CERTIFICATE OF
)	APPEALABILITY
A. K. SCRIBNER,)	
)	
)	
Respondent.)	
)	
)	

Petitioner is a state prisoner proceeding pro se in an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72-302.

On May 3, 2006, the Magistrate Judge filed a Findings and Recommendations to dismiss this action because of Petitioner's failure to obey the Court's order, i.e., a February 21, 2006 order to either submit an application to proceed in forma pauperis or pay the \$5.00 filing fee. (Doc. 5). The Findings and Recommendations were served on all parties and contained notice that any objections to the Findings and Recommendations were to be filed within thirty days.. Petitioner, through his attorney, filed objections on May 31, 2006. (Doc. 6).

In her objections, Petitioner's counsel offered to pay the \$5.00 filing fee, which she did in fact pay on June 12, 2006. Although the Findings and Recommendations were never formally withdrawn, the Court considers the issue resolved by counsel's payment of the filing fee. Since that time, the case has been awaiting its turn on the Court's docket to be reviewed on the merits of the claims raised in the petition.

However, on November 7, 2007, Petitioner, acting pro se, filed a notice of appeal. (Doc. 10). Although no express request was made for a certificate of appealability, the notice of appeal

1 shall be deemed to constitute a request for a certificate. See United States v. Asrar, 108 F.3d
2 217, 218 (9th Cir. 1997); Fed. R.App. P. 22(b). There is no order or decision of the Court from
3 which such a notice of appeal could be taken since there has been no activity in the case since the
4 events discussed above.

5 The requirement that a petitioner seek a certificate of appealability is a gate-keeping
6 mechanism that protects the Court of Appeals from having to devote resources to frivolous
7 issues, while at the same time affording petitioners an opportunity to persuade the Court that,
8 through full briefing and argument, the potential merit of claims may appear. Lambright v.
9 Stewart, 220 F.3d 1022, 1025 (9th Cir. 2000). However, a state prisoner seeking a writ of habeas
10 corpus has no absolute entitlement to appeal a district court's denial of his petition, and an appeal
11 is only allowed in certain circumstances. Miller-El v. Cockrell, 537 U.S. 322, 335-336 (2003).
12 The controlling statute, 28 U.S.C. § 2253, provides as follows:

- 13 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district
14 judge, the final order shall be subject to review, on appeal, by the court of appeals for the
15 circuit in which the proceeding is held.
16 (b) There shall be no right of appeal from a final order in a proceeding to test the validity
17 of a warrant to remove to another district or place for commitment or trial a person
18 charged with a criminal offense against the United States, or to test the validity of such
19 person's detention pending removal proceedings.
20 (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may
21 not be taken to the court of appeals from--
22 (A) the final order in a habeas corpus proceeding in which the detention
23 complained of arises out of process issued by a State court; or
24 (B) the final order in a proceeding under section 2255.
25 (2) A certificate of appealability may issue under paragraph (1) only if the applicant has
26 made a substantial showing of the denial of a constitutional right.
27 (3) The certificate of appealability under paragraph (1) shall indicate which specific issue
28 or issues satisfy the showing required by paragraph (2).

22 Accordingly, final orders issued by a federal district court in habeas corpus proceedings
23 are reviewable by the circuit court of appeals, and, in order to have final orders reviewed, a
24 petitioner must obtain a certificate of appealability. 28 U.S.C. § 2253. This Court will issue a
25 certificate of appealability when a petitioner makes a substantial showing of the denial of a
26 constitutional right. 28 U.S.C. § 2253(c)(2). To make a substantial showing, the petitioner must
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1 establish that “reasonable jurists could debate whether (or, for that matter, agree that) the petition
2 should have been resolved in a different manner or that the issues presented were ‘adequate to
3 deserve encouragement to proceed further’.” Slack v. McDaniel, 529 U.S. 473, 484 (2000)
4 (*quoting* Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).

5 In the present case, there has been no order, much less a final order, from which
6 Petitioner might appeal. To the contrary, the case remains active and is awaiting a decision on
7 the merits. Accordingly, the Court finds that Petitioner has not made the required substantial
8 showing of the denial of a constitutional right to justify the issuance of a certificate of
9 appealability. Reasonable jurists would not find it debatable that Petitioner has not shown an
10 entitlement to federal habeas corpus relief. Accordingly, the Court hereby ORDERS that
11 Petitioner’s request for a certificate of appealability is DENIED.

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14 IT IS SO ORDERED.

15 **Dated: February 5, 2008**

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE