

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

RODERICK WASHINGTON,

1:07-cv-00554 LJO DLB HC

Petitioner,

ORDER DECLINING TO ISSUE
CERTIFICATE OF APPEALABILITY

v.

[Doc. 23]

ARNOLD SCHWARZENEGGER,

Respondent.

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On January 3, 2008, the Court dismissed the instant petition, without prejudice for failure to exhaust the state court remedies. (Court Doc. 21.) On January 10, 2008, Petitioner filed a notice of appeal and request for a certificate of appealability. (Court Doc. 23.)

A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition, and an appeal is only allowed in certain circumstances. Miller-El v. Cockrell, 537 U.S. 322, 335-336 (2003). The controlling statute, 28 U.S.C. § 2253, provides as follows:

- (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
- (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

1 (c)(1) Unless a circuit justice or judge issues a certificate of appealability,
2 an appeal may not be taken to the court of appeals from--

3 (A) the final order in a habeas corpus proceeding in which the
4 detention

5 complained of arises out of process issued by a State court; or

6 (B) the final order in a proceeding under section 2255.

7 (2) A certificate of appealability may issue under paragraph (1) only if the
8 applicant has made a substantial showing of the denial of a constitutional
9 right.

10 (3) The certificate of appealability under paragraph (1) shall indicate
11 which specific issue or issues satisfy the showing required by paragraph
12 (2).

13 When the district court denies a habeas petition on procedural grounds, as the court did in
14 this action, a certificate of appealability should issue, and an appeal of the district court's order
15 may be taken, if the petitioner shows, at least, that jurists of reason would find it debatable
16 whether the petition states a valid claim of the denial of a constitutional right, and that jurists of
17 reason would find it debatable whether the district court was correct in its procedural ruling.
18 Slack v. McDaniel, 529 U.S. 473, 484-85 (2000).

19 In the present case, the Court finds that reasonable jurists would not disagree with this
20 court's dismissal of the instant petition, without prejudice, for failure to exhaust the state court
21 remedies. Based on the foregoing, the Court DECLINES to issue a certificate of appealability.

22 IT IS SO ORDERED.

23 **Dated: February 5, 2008**

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