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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MICHAEL L. BANKS,)	1:09-cv-00152-LJO-JLT HC
)	
Petitioner,)	ORDER ADOPTING FINDINGS AND RECOMMENDATION (Doc. 25)
)	
v.)	ORDER GRANTING MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (Doc. 17)
)	
DEBRA DEXTER,)	ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS (Doc. 1)
)	
Respondent.)	ORDER DIRECTING CLERK OF COURT TO ENTER JUDGMENT

ORDER DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY

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 26, 2009, Petitioner filed the instant petition for writ of habeas corpus. (Doc. 1). On July 13, 2009, the Court ordered Respondent to file a response. (Doc. 11). On September 10, 2009, Respondent filed a motion to dismiss the petition. (Doc. 17). On March 31, 2010, the Magistrate Judge assigned to the case filed a Findings and Recommendation recommending that Respondent’s motion to dismiss be granted and that the petition for writ of habeas corpus be dismissed because the petition was untimely. ([Doc. 25](#)). This Findings and

1 Recommendation was served on all parties and contained notice that any objections were to be
2 filed within twenty days from the date of service of that order. To date, the parties have not filed
3 timely objections to the Findings and Recommendation.

4 In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(C), this Court has conducted
5 a *de novo* review of the case. Having carefully reviewed the entire file, the Court concludes that
6 the Magistrate Judge’s Findings and Recommendation is supported by the record and proper
7 analysis.

8 Moreover, the Court declines to issue a certificate of appealability. A state prisoner
9 seeking a writ of habeas corpus has no absolute entitlement to appeal a district court’s denial of
10 his petition, and an appeal is only allowed in certain circumstances. Miller-El v. Cockrell, 537
11 U.S. 322, 335-336 (2003). The controlling statute in determining whether to issue a certificate
12 of appealability is 28 U.S.C. § 2253, which 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
circuit in which the proceeding is held.

15 (b) There shall be no right of appeal from a final order in a proceeding to test the validity
16 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.

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

18 (A) the final order in a habeas corpus proceeding in which the detention
complained of arises out of process issued by a State court; or

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

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

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

22 If a court denied a petitioner’s petition, the court may only issue a certificate of
23 appealability when a petitioner makes a substantial showing of the denial of a constitutional
24 right. 28 U.S.C. § 2253(c)(2). To make a substantial showing, the petitioner must establish that
25 “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have
26 been resolved in a different manner or that the issues presented were ‘adequate to deserve
27 encouragement to proceed further’.” Slack v. McDaniel, 529 U.S. 473, 484 (2000) (*quoting*
28 Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).

1 In the present case, the Court finds that Petitioner has not made the required substantial
2 showing of the denial of a constitutional right to justify the issuance of a certificate of
3 appealability. Reasonable jurists would not find the Court's determination that Petitioner is not
4 entitled to federal habeas corpus relief debatable, wrong, or deserving of encouragement to
5 proceed further. Thus, the Court DECLINES to issue a certificate of appealability.

6 Accordingly, IT IS HEREBY ORDERED that:

- 7 1. The Findings and Recommendation, filed March 31, 2010 (Doc. 25), is
8 ADOPTED IN FULL;
- 9 2. Respondent's Motion to Dismiss (Doc. 17), is GRANTED;
- 10 3. This petition for writ of habeas corpus (Doc. 1), is DISMISSED;
- 11 4. The Clerk of Court is DIRECTED to ENTER JUDGMENT and close the file;
12 and,
- 13 5. The Court DECLINES to issue a certificate of appealability.

14 This order terminates the action in its entirety.

15 IT IS SO ORDERED.

16 **Dated:** April 29, 2010

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