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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JESUS AARON GAYTAN,)	1:09-cv-00752-AWI MJS HC
)	
Petitioner,)	
)	ORDER DECLINING ISSUANCE OF
v.)	CERTIFICATE OF APPEALABILITY
)	
K. HARRINGTON, Warden,)	[Doc. 44]
)	
Respondents.)	

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

On June 21, 2011, this Court adopted in part and modified in part the Findings and Recommendation of the Magistrate Judge and granted Respondent’s Motion to Dismiss. (Order, ECF No. 42.) Accordingly, the petition was denied and judgment entered the same day. (ECF No. 43.) In the order June 21, 2011 order, this court declined to issue a certificate of appealability. (Order.)

On July 25, 2011, Petitioner filed a motion for a certificate of appealability. (Mot., ECF No. 44.) A certificate of appealability must issue for the matter to be properly heard on appeal, and the Court shall review the matter for that limited purpose.

A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court’s denial of his petition; an appeal is only allowed in certain circumstances. Miller-El v. Cockrell, 123 S.Ct. 1029, 1039 (2003). The controlling statute in determining whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

1 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a
2 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.

3 (b) There shall be no right of appeal from a final order in a proceeding to test the
4 validity of a warrant to remove to another district or place for commitment or trial
5 a person charged with a criminal offense against the United States, or to test the
6 validity of such person's detention pending removal proceedings.

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

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

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

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

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

17 If a court denies a petitioner's petition, the court may only issue a certificate of appealability "if
18 jurists of reason could disagree with the district court's resolution of his constitutional claims or that
19 jurists could conclude the issues presented are adequate to deserve encouragement to proceed further."
20 Miller-El, 123 S.Ct. at 1034; Slack v. McDaniel, 529 U.S. 473, 484 (2000). While the petitioner is not
21 required to prove the merits of his case, he must demonstrate "something more than the absence of
22 frivolity or the existence of mere good faith on his . . . part." Miller-El, 123 S.Ct. at 1040.

23 On June 21, 2011, this Court modified and adopted the finding and recommendations of the
24 Magistrate Judge, dismissed the petition with prejudice, and declined to issue a certificate of
25 appealability. The Court based its dismissal of the Petition based on its untimely filing, and the
26 unavailability of statutory or equitable tolling of the limitations period. Petitioner, in his motion for a
27 certificate of appealability, has not presented the Court with further information or arguments that would
28 warrant the issuance of a certificate of appealability.

In the present case, the Court finds that reasonable jurists would not find the Court's
determination that Petitioner is not entitled to federal habeas corpus relief debatable, wrong, or deserving
of encouragement to proceed further. Petitioner has not made the required substantial showing of the
denial of a constitutional right.

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Accordingly, the Court hereby DECLINES issuance of a certificate of appealability.

IT IS SO ORDERED.

Dated: November 8, 2011



CHIEF UNITED STATES DISTRICT JUDGE