

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LEE SISCO,

Petitioner,

v.

JAMES D. HARTLEY,

Respondent.

No. 1:09-CV-1612 LJO JMD (HC)

ORDER GRANTING IN PART
PETITIONER'S REQUEST FOR
CERTIFICATE OF APPEALABILITY
[Doc. #23]

Petitioner Lee Sisco ("Petitioner") is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On September 16, 2010, the Magistrate Judge issued a Findings and Recommendation ("F&R") that recommended the petition be granted. See Doc. No. 16. On November 23, 2010, the Court declined to adopt the F&R and denied Petitioner's writ of habeas corpus. See Doc. No. 20. On December 9, 2010, Petitioner filed a request for a certificate of appealability. See Doc. No. 23. Petitioner advances two issues that he would like to raise on appeal:

(1) When the Board of Parole Hearings's denial of parole was based on Mr. Sisco's invocation of his right to not discuss his crime, did the district court err in holding that the Board's decision was supported by some evidence of current dangerousness when considered in light of the full record and thus was constitutional?

(2) Where the Board is legally prohibited from requiring a prisoner to discuss his or her crime with the Board's commissioner's, may the Board nevertheless require the prisoner to discuss the offense with its other agents?

See Doc. No. 23 at 2.

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, 336 (2003). The controlling statute in determining whether to issue a

1 certificate of appealability is 28 U.S.C. § 2253, which provides that a circuit judge or judge may
2 issue a certificate of appealability where “the applicant has made a substantial showing of the denial
3 of a constitutional right.” Where the court denies a habeas petition, the court may only issue a
4 certificate of appealability “if jurists of reason could disagree with the district court’s resolution of
5 his constitutional claims or that jurists could conclude the issues presented are adequate to deserve
6 encouragement to proceed further.” Miller-El, 537 U.S. at 326; Slack v. McDaniel, 529 U.S. 473,
7 484 (2000). While the petitioner is not required to prove the merits of his case, he must demonstrate
8 “something more than the absence of frivolity or the existence of mere good faith on his . . . part.”
9 Miller-El, 537 U.S. at 338.

10 In the present case, the Court finds that with respect to the first issue, Petitioner has misstated
11 the Board’s decision as the Board’s denial of parole was not based on Petitioner’s refusal to discuss
12 the commitment offense. The Board concluded that Petitioner would pose an unreasonable risk of
13 danger to society if released because of Petitioner’s commitment offense, which was carried out in an
14 especially cruel and callous manner, and because Petitioner’s 2006 psychological evaluation was not
15 totally supportive of release as it stated that Petitioner had not fully accepted responsibility for his
16 life crime. See Transcript at 64-67. Because Petitioner has misstated the Board’s decision,
17 reasonable jurists would not find the Court’s determination that Petitioner is not entitled to federal
18 habeas corpus relief debatable, wrong, or deserving of encouragement to proceed further. See
19 Miller-El, 537 U.S. at 326. Therefore, the Court denies Petitioner’s request for a certificate of
20 appealability as to the first issue.

21 With respect to the second issue, the Court reasonably construes it to mean that Petitioner is
22 challenging whether a psychological evaluation, which concludes that a prisoner lacks sufficient
23 insight based solely on the Petitioner’s refusal to discuss the crime with the prison psychologist,
24 constitutes “some evidence” of current dangerousness. As to the second issue, reasonable jurists
25 could find the Court’s determination that Petitioner is not entitled to federal habeas corpus relief
26 debatable. Accordingly, the Court hereby GRANTS a certificate of appealability as to the second
27 issue.

ORDER

IT IS HEREBY ORDERED that:

1. Petitioner's request for a certificate of appealability on the first issue is DENIED; and
2. Petitioner's request for a certificate of appealability on the question of whether a psychological evaluation, which concludes that a prisoner lacks sufficient insight based solely on the prisoner's refusal to discuss the crime with the prison psychologist, constitutes "some evidence" of current dangerousness, is GRANTED.

IT IS SO ORDERED.

Dated: December 16, 2010

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