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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DANIEL TORRES,)	1:10-cv-00773-OWW-JLT HC
)	
Petitioner,)	ORDER ADOPTING FINDINGS AND
)	RECOMMENDATION (Doc. 12)
v.)	
)	ORDER GRANTING MOTION TO DISMISS
)	PETITION FOR WRIT OF HABEAS CORPUS
)	(Doc. 10)
JAMES HARTLEY,)	
)	ORDER DISMISSING PETITION FOR WRIT
Respondent.)	OF HABEAS CORPUS (Doc. 1)
)	
)	ORDER DIRECTING CLERK OF COURT
)	TO ENTER JUDGMENT

ORDER DENYING AS MOOT PETITIONER'S
MOTION TO FILE AMENDED PETITION
(Doc. 13)

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 May 3, 2010, Petitioner filed the instant petition for writ of habeas corpus. (Doc. 1). On June 11, 2010, the Court ordered Respondent to file a response. (Doc. 7). On August 10, 2010, Respondent filed a motion to dismiss the petition. (Doc. 10). On October 14, 2010, the Magistrate Judge assigned to the case filed a Findings and Recommendation recommending that

1 Respondent's motion to dismiss be granted and that the petition for writ of habeas corpus be
2 dismissed because the petition was untimely. ([Doc. 12](#)). This Findings and Recommendation
3 was served on all parties and contained notice that any objections were to be filed within twenty
4 days from the date of service of that order. To date, the parties have not filed timely objections
5 to the Findings and Recommendation. However, on October 25, 2010, Petitioner submitted a
6 proposed first amended petition which the Court construed as a request to file an amended
7 petition. (Doc. 13). The amended petition contains essentially the same arguments as those
8 raised in the original petition; however, Petitioner has included additional chronological
9 information that corrects similar information contained in the original petition.

10 In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(C), this Court has conducted
11 a *de novo* review of the case. Having carefully reviewed the entire file, the Court concludes that
12 the Magistrate Judge's Findings and Recommendation is supported by the record and proper
13 analysis. Nothing in the proposed first amended petition alters the analysis set forth by the
14 Magistrate Judge in her Findings and Recommendations regarding the untimeliness of the
15 original petition.

16 Moreover, the Court declines to issue a certificate of appealability. A state prisoner
17 seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of
18 his petition, and an appeal is only allowed in certain circumstances. Miller-El v. Cockrell, 537
19 U.S. 322, 335-336 (2003). The controlling statute in determining whether to issue a certificate
20 of appealability is 28 U.S.C. § 2253, which provides as follows:

- 21 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district
22 judge, the final order shall be subject to review, on appeal, by the court of appeals for the
23 circuit in which the proceeding is held.
24 (b) There shall be no right of appeal from a final order in a proceeding to test the validity
25 of a warrant to remove to another district or place for commitment or trial a person
26 charged with a criminal offense against the United States, or to test the validity of such
27 person's detention pending removal proceedings.
28 (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--
(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
(B) the final order in a proceeding under section 2255.
(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.
(3) The certificate of appealability under paragraph (1) shall indicate which specific issue

1 or issues satisfy the showing required by paragraph (2).

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

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

14 Accordingly, IT IS HEREBY ORDERED that:

- 15 1. The Findings and Recommendation, filed October 14, 2010 (Doc. 12), is
16 ADOPTED IN FULL;
- 17 2. Respondent's Motion to Dismiss (Doc. 10), is GRANTED;
- 18 3. This petition for writ of habeas corpus (Doc. 1), is DISMISSED;
- 19 4. The Clerk of Court is DIRECTED to ENTER JUDGMENT and close the file;
- 20 5. Petitioner's motion to file a first amended petition (Doc. 13), is DENIED as
21 MOOT; and,
- 22 6. The Court **DECLINES** to issue a certificate of appealability.

23 This order terminates the action in its entirety.

24 IT IS SO ORDERED.

25 **Dated:** November 23, 2010

26 /s/ Oliver W. Wanger
27 UNITED STATES DISTRICT JUDGE