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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOSE ALFREDO GONZALES,)	1:10-cv-01436-JLT HC
)	
Petitioner,)	ORDER GRANTING PETITIONER'S
)	MOTION TO VOLUNTARILY DISMISS
v.)	PETITION
)	(Doc. 14)
)	
EDMUND G. BROWN, JR., et al.,)	ORDER DISMISSING PETITION FOR WRIT
)	OF HABEAS CORPUS WITHOUT
Respondents.)	PREJUDICE (Doc. 1)
_____)		ORDER DIRECTING CLERK OF COURT TO
		CLOSE FILE
		ORDER DECLINING TO ISSUE
		CERTIFICATE OF APPEALABILITY

PROCEDURAL HISTORY

Petitioner is a state prisoner proceeding pro se with an application for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On August 20, 2010, Petitioner filed his written consent to the jurisdiction of the United States Magistrate Judge for all purposes. (Doc. 7). On December 10, 2010, Respondent filed his written consent to the jurisdiction of the United States Magistrate Judge. (Doc. 13).

The instant federal petition for writ of habeas corpus was filed on July 30, 2010 in the Sacramento Division of this Court. (Doc. 1). On August 10, 2010, the case was transferred to the Fresno Division. (Doc. 4). On November 29, 2010, the Court ordered Respondent to file a

1 response to the petition. (Doc. 9). However, before Respondent's response was due, Petitioner,
2 on January 5, 2011, filed the instant Notice of Voluntary Dismissal. (Doc. 14). On January 19,
3 2011, Respondent filed a Statement of Non-Opposition to Petitioner's Notice of Voluntary
4 Dismissal. (Doc. 15).

5 DISCUSSION

6 Subject to other provisions of law, a petitioner may voluntarily dismiss an action without
7 leave of court before service by the adverse party of an answer or motion for summary judgment.
8 Fed. R. Civ. P. 41(a). Otherwise, an action shall not be dismissed except upon order of the Court
9 and upon such terms and conditions as the court deems proper. Id. Here, no answer has been
10 served or filed, and thus, no leave of Court is required for dismissal. Additionally, the Court
11 notes that Respondent has indicated his non-opposition to Petitioner's request for dismissal.
12 Accordingly, the Court will grant Petitioner's request for dismissal.

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

18 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district
19 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.

20 (b) There shall be no right of appeal from a final order in a proceeding to test the validity
21 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.

22 (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--

23 (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

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

25 (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.

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

27 If a court denied a petitioner's petition, the court may only issue a certificate of
28 appealability when a petitioner makes a substantial showing of the denial of a constitutional

1 right. 28 U.S.C. § 2253(c)(2). To make a substantial showing, the petitioner must establish that
2 “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have
3 been resolved in a different manner or that the issues presented were ‘adequate to deserve
4 encouragement to proceed further’.” Slack v. McDaniel, 529 U.S. 473, 484 (2000) (*quoting*
5 Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).

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

11 **ORDER**

12 Accordingly, IT IS ORDERED as follows:

- 13 1. Petitioner’s motion for voluntary dismissal (Doc. 14), is **GRANTED**;
- 14 2. The petition for writ of habeas corpus (Doc. 1), is **DISMISSED** without prejudice;
- 15 3. The Clerk of the Court is **DIRECTED** to close this action because this order
16 terminates the proceedings in its entirety; and,
- 17 4. The Court **DECLINES** to issue a certificate of appealability.

18
19 IT IS SO ORDERED.

20 Dated: February 18, 2011

21 /s/ Jennifer L. Thurston
22 UNITED STATES MAGISTRATE JUDGE
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