

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

W.C. SPIVEY,

Petitioner,

v.

M. McDONALD, Warden, and  
CONNIE GIPSON, Warden,

Respondents.

Case No. 1:12-cv-00206-LJO-SKO HC

ORDER DECLINING TO ISSUE  
CERTIFICATE OF APPEALABILITY

(Doc. 45)

On February 13, 2012, Petitioner filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On March 24, 2015, the Magistrate Judge filed findings and recommendations in which she recommended that the Court deny the petition for writ of habeas corpus and decline to issue a certificate of appealability. Petitioner filed objections on April 17, 2015. On May 26, 2015, the District Court adopted the findings and recommendations, ordered entry of judgment for Respondent, and declined to issue a certificate of appealability. Thereafter, Petitioner filed an appeal in the U.S. Court of Appeals for the Ninth Circuit. On June 18, 2015, he moved the District Court for a certificate of appealability.

A petitioner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition, but may only appeal in certain circumstances. *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). In a proceeding under 28 U.S.C. § 2255, an applicant may not appeal

///

1 a District Court judgment unless the District Judge or a Circuit Judge issues a certificate of  
2 appealability under 28 U.S.C. § 2253(c). F.R.App.P. 22(b). Section 2253(c) provides:

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

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

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

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

11 (3) The certificate of appealability under paragraph (1) shall indicate  
12 which specific issues or issues satisfy the showing required by paragraph  
13 (2).

14 If a court denies a habeas petition, the court may only issue a certificate of  
15 appealability "if jurists of reason could disagree with the district court's resolution of  
16 his constitutional claims or that jurists could conclude the issues presented are adequate  
17 to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327; *Slack v.*  
18 *McDaniel*, 529 U.S. 473, 484 (2000). Although the petitioner is not required to prove  
19 the merits of his case, he must demonstrate "something more than the absence of  
20 frivolity or the existence of mere good faith on his . . . part." *Miller-El*, 537 U.S. at  
21 338.

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

27 ///

**CONCLUSION AND ORDER**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

The Court hereby DECLINES to issue a certificate of appealability.

IT IS SO ORDERED.

Dated: February 1, 2016

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