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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ABEL AGUIRRE,

1:12-CV-01305 GSA HC

Petitioner,

ORDER DISMISSING PETITION

v.

ORDER DIRECTING CLERK OF COURT  
TO ENTER JUDGMENT AND TERMINATE  
CASE

PEOPLE,

Respondent.

ORDER DECLINING TO ISSUE  
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. He has consented to the jurisdiction of the magistrate judge pursuant to 28 U.S.C. § 636(c).

On August 10, 2012, Petitioner filed the instant petition for writ of habeas corpus. He challenges a conviction for rape sustained in Tulare County Superior Court. Following a preliminary review of the petition, on August 30, 2012, the Court determined the petition failed to state a cognizable claim for relief and failed to name a proper respondent. Petitioner was given thirty (30) days leave to file an amended petition, and he was provided a blank habeas form by the Clerk of Court. He was forewarned that failure to comply would result in dismissal of the petition and termination of the action. Over thirty (30) days have passed and Petitioner has failed to comply. Accordingly, the petition will be dismissed for failure to state a cognizable claim and for failure to

1 prosecute. See Local Rule 110; Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992).

## 2 CERTIFICATE OF APPEALABILITY

3 A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a  
4 district court’s denial of his petition, and an appeal is only allowed in certain circumstances. Miller-  
5 El v. Cockrell, 537 U.S. 322, 335-36 (2003). The controlling statute in determining whether to issue  
6 a certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

7 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a  
8 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.

9 (b) There shall be no right of appeal from a final order in a proceeding to test the  
10 validity 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  
11 validity of such person’s detention pending removal proceedings.

12 (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—

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

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

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

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

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

26 In the present case, the Court finds that reasonable jurists would not find the Court’s  
27 determination that Petitioner is not entitled to federal habeas corpus relief debatable, wrong, or  
28 deserving of encouragement to proceed further. Petitioner has not made the required substantial

1 showing of the denial of a constitutional right. Accordingly, the Court hereby DECLINES to issue a  
2 certificate of appealability.

3 **ORDER**

4 Accordingly, IT IS HEREBY ORDERED:

- 5 1) The petition for writ of habeas corpus is DISMISSED;  
6 2) The Clerk of Court is DIRECTED to enter judgment and terminate the case; and  
7 3) The Court DECLINES to issue a certificate of appealability.

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9 IT IS SO ORDERED.

10 **Dated: October 30, 2012**

/s/ Gary S. Austin  
UNITED STATES MAGISTRATE JUDGE

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