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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JORGE A. ALCANTAR,

Petitioner,

v.

F. FOULK,

Respondent.

Case No. 1:14-cv-00747-LJO-MJS
**ORDER DENYING MOTION FOR
ISSUANCE OF CERTIFICATE OF
APPEALABILITY**
(Doc. 24)

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus under 28 U.S.C. § 2254.

On August 5, 2016, this Court dismissed the petition and declined to issue a certificate of appealability. (Order, ECF No. 20.) Judgment was entered the same day.

Despite the fact that the Court declined to issue a certificate of appealability when denying the petition, on August 25, 2016, Petitioner filed a motion requesting the Court to issue a certificate of appealability. (ECF No. 40.)

A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court’s denial of his petition; an appeal is only allowed in certain circumstances. Miller-El v. Cockrell, 123 S.Ct. 1029, 1039 (2003). The controlling statute in determining

1 whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides as
2 follows:

- 3
- 4 (a) In a habeas corpus proceeding or a proceeding under section 2255
5 before a district judge, the final order shall be subject to review, on
6 appeal, by the court of appeals for the circuit in which the proceeding
7 is held.
- 8 (b) There shall be no right of appeal from a final order in a proceeding to
9 test the validity of a warrant to remove to another district or place for
10 commitment or trial a person charged with a criminal offense against
11 the United States, or to test the validity of such person's detention
12 pending removal proceedings.
- 13 (c) (1) Unless a circuit justice or judge issues a certificate of appealability,
14 an appeal may not be taken to the court of appeals from—
- 15 (A) the final order in a habeas corpus proceeding in which the
16 detention complained of arises out of process issued by a
17 State court; or
- 18 (B) the final order in a proceeding under section 2255.
- 19 (2) A certificate of appealability may issue under paragraph (1) only if
20 the applicant has made a substantial showing of the denial of a
21 constitutional right.
- 22 (3) The certificate of appealability under paragraph (1) shall indicate
23 which specific issue or issues satisfy the showing required by
24 paragraph (2).

25 If a court denies a petitioner's petition, the court may only issue a certificate of
26 appealability "if jurists of reason could disagree with the district court's resolution of his
27 constitutional claims or that jurists could conclude the issues presented are adequate to
28 deserve encouragement to proceed further." Miller-EI, 123 S.Ct. at 1034; Slack v.
McDaniel, 529 U.S. 473, 484 (2000). While the petitioner is not required to prove the
merits of his case, he must demonstrate "something more than the absence of frivolity or
the existence of mere good faith on his . . . part." Miller-EI, 123 S.Ct. at 1040.

On August 5, 2016, this Court dismissed Petitioner's petition with prejudice and
declined to issue a certificate of appealability. The Court based its dismissal on the
reasoning set forth in the detailed findings and recommendation issued by the
Magistrate Judge on May 25, 2016. In doing so, the Court determined that the state

1 court was not unreasonable in denying Petitioner claims that there was insufficient
2 evidence to support the gang enhancement, and that his due process rights were
3 violated by the denial of the trial court to bifurcate the gang enhancement proceedings.
4 Upon review of the reasoning set forth by the Magistrate Judge and adopted by this
5 Court, the Court finds that reasonable jurists would not find the Court's determination
6 that Petitioner is not entitled to federal habeas corpus relief debatable, wrong, or
7 deserving of encouragement to proceed further. The Court again finds that Petitioner
8 has not made the required substantial showing of the denial of a constitutional right.

9 Accordingly, the Court DENIES the motion, and DECLINES to issue a certificate of
10 appealability.

11 IT IS SO ORDERED.

12 Dated: September 27, 2016

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