



1 contending that he now wishes to voluntarily dismiss his petition in this Court and instead seek  
2 permission from the United States Court of Appeals for the Ninth Circuit to file a successive petition.  
3 (Doc. 9).

#### 4 DISCUSSION

5 Subject to other provisions of law, a petitioner may voluntarily dismiss an action without leave  
6 of court before service by the adverse party of an answer or motion for summary judgment. Fed. R.  
7 Civ. P. 41(a). Otherwise, an action shall not be dismissed except upon order of the Court and upon  
8 such terms and conditions as the court deems proper. Id. Here, no answer has been served or filed.  
9 Accordingly, Petitioner is entitled to dismiss the petition without leave of Court. Id.

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

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

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

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

12 **ORDER**

13 For the foregoing reasons, it is **HEREBY ORDERED** as follows:

- 14 1. The Findings and Recommendations issued on May 22, 2014 (Doc. 7), is **WITHDRAWN**;
- 15 2. Petitioner's motion to dismiss the petition (Doc. 9), is **GRANTED**;
- 16 3. The petition for writ of habeas corpus (Doc. 1), is **DISMISSED** without prejudice;
- 17 4. The Clerk of the Court is **DIRECTED** to enter judgment and close the file; and,
- 18 5. The Court **DECLINES** to issue a certificate of appealability.

19  
20 **IT IS SO ORDERED.**

21 Dated: **July 1, 2014**

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