1		
2		
3	UNITED STATES DISTRICT COURT	
4	EASTERN DISTRICT OF CALIFORNIA	
5	ANTONIO P. PALOMINOS,) Case No.: 1:14-cv-00759-LJO-JLT
6	Petitioner,) ORDER TO GRANT PETITIONER'S MOTION TO
7	v.) DISMISS PETITION FOR WRIT OF HABEAS) CORPUS (Doc. 9))) ORDER DISMISSING PETITION FOR WRIT OF) HABEAS CORPUS WITHOUT PREJUDICE (Doc.) 1)
8	ROY E. BARNES, Warden,	
9 10	Respondent.	
10)) ORDER WITHDRAWING FINDINGS AND
11) RECOMMENDATIONS FILED May 22, 2014 (Doc. 7)
13) ORDER DIRECTING CLERK OF COURT TO
14) ENTER JUDGMENT AND CLOSE FILE
15) ORDER DECLINING TO ISSUE CERTIFICATE OF APPEALABILITY
16		-
17	Petitioner is a state prisoner proceeding in propria persona with a petition for writ of habeas	
18	corpus pursuant to 28 U.S.C. § 2254.	
19	PROCEDURAL HISTORY	
20	The instant petition was filed on May 14, 2014 in the United States District Court for the	
21	Northern District of California, and was transferred to this Court on May 20, 2014. (Docs. 1, 3, & 4).	
22	In the course of conducting a preliminary screening of the petition, it came to the Court's attention that	
23	Petitioner had previously filed at least two prior federal habeas petitions challenging this same	
24	conviction. Accordingly, on May 22, 2014, the Magistrate Judge issued Findings and	
25	Recommendations to dismiss the case as successive. (Doc. 7). Those Findings and Recommendations	
26	gave all parties 21 days within which to file objections. On June 26, 2014, before the Findings and	
27	Recommendations were adopted by the District Judge, Petitioner filed the instant motion to dismiss,	
28		

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

DISCUSSION

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

Moreover, the Court declines to issue a certificate of appealability. A state prisoner seeking a
writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition, and
an appeal is only allowed in certain circumstances. <u>Miller-El v. Cockrell</u>, 537 U.S. 322, 335-336
(2003). The controlling statute in determining whether to issue a certificate of appealability is 28

14 U.S.C. § 2253, which provides as follows:

4

5

6

7

8

9

15

16

17

18

19

20

21

22

23

24

25

26

27

28

- (a) In a habeas corpus proceeding or a proceeding under section 2255 before a 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.
- (b) There shall be no right of appeal from a final order in a proceeding to test the 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 validity of such person's detention pending removal proceedings.

(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—

(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

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

(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.

(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		
22	UNITED STATES DISTRICT JUDGE		
23			
24			
25			
26			
27			
28			
	3		