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

VESTER L. PATTERSON,

Petitioner,

v.

STU SHERMAN, Warden,

Respondent.

Case No. 1:15-cv-00053-LJO-MJS

**ORDER DECLINING TO ISSUE A
CERTIFICATE OF APPEALABILITY
(Doc. 51)**

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

On September 16, 2015, this Court dismissed the petition as untimely and declined to issue a certificate of appealability. (Order, ECF No. 30.) Judgment was entered the same day.

Petitioner then filed three separate motions to vacate the judgment. (ECF Nos. 32, 37, 40.) The Court denied the first two, however, Petitioner filed the present appeal to the Ninth Circuit before the Court could address the third motion. It appears that Petitioner is appealing the Court's denial of his second motion to vacate the judgment. (ECF Nos. 39, 44.) On November 8, 2016, the Ninth Circuit remanded the case for the

1 limited purpose of determining whether a Certificate of Appealability should issue. (ECF
2 No. 51.)¹

3 A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a
4 district court's denial of his petition; an appeal is only allowed in certain circumstances.
5 Miller-El v. Cockrell, 123 S.Ct. 1029, 1039 (2003). The controlling statute in determining
6 whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides as
7 follows:

8 (a) In a habeas corpus proceeding or a proceeding under section 2255
9 before a district judge, the final order shall be subject to review, on
10 appeal, by the court of appeals for the circuit in which the proceeding
11 is held.

12 (b) There shall be no right of appeal from a final order in a proceeding to
13 test the validity of a warrant to remove to another district or place for
14 commitment or trial a person charged with a criminal offense against
15 the United States, or to test the validity of such person's detention
16 pending removal proceedings.

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

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

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

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

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

If a court denies a petitioner's petition, the court may only issue a certificate of
appealability "if jurists of reason could disagree with the district court's resolution of his
constitutional claims or that jurists could conclude the issues presented are adequate to
deserve encouragement to proceed further." Miller-El, 123 S.Ct. at 1034; Slack v.
McDaniel, 529 U.S. 473, 484 (2000). While the petitioner is not required to prove the

¹ While the order of the Ninth Circuit was filed on November 8, 2016, it was not filed on this Court's
electronic docket until November 28, 2016.

1 merits of his case, he must demonstrate “something more than the absence of frivolity or
2 the existence of mere good faith on his . . . part.” Miller-EI, 123 S.Ct. at 1040.

3 On September 27, 2016, this Court dismissed Petitioner’s motion to vacate the
4 judgment. The Court based its dismissal on the fact that Petitioner did not present any
5 new argument why the Court was incorrect for dismissing his petition. Petitioner
6 contends that his claims challenge the duration of his confinement, not his conviction,
7 and therefore are timely. However, the Court addressed and denied those claims in its
8 order finding the petition untimely. (See, ECF No. 20 at 6.) As Petitioner presented no
9 new argument as to how the Court erred in finding his petition untimely, the Court finds
10 that reasonable jurists would not find the Court’s determination that Petitioner is not
11 entitled to federal habeas corpus relief debatable, wrong, or deserving of
12 encouragement to proceed further.

13 Accordingly, the Court DENIES the motion, and DECLINES to issue a certificate of
14 appealability. The Court ORDERS the Clerk of Court to forward a copy of this order to
15 the Ninth Circuit Court of Appeals.

16
17 IT IS SO ORDERED.

18 Dated: November 30, 2016

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