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6 **UNITED STATES DISTRICT COURT**

7 EASTERN DISTRICT OF CALIFORNIA

9 JAMES CHAVEZ,

10 Petitioner,

11 v.

12 WARDEN,

13 Respondent.

Case No. 1:17-cv-01045-SAB-HC

ORDER DISMISSING WITHOUT
PREJUDICE PETITION FOR WRIT OF
HABEAS CORPUS, DIRECTING CLERK
OF COURT TO CLOSE CASE, AND
DECLINING TO ISSUE CERTIFICATE OF
APPEALABILITY

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15 Petitioner is proceeding pro se with a petition for writ of habeas corpus pursuant to 28
16 U.S.C. § 2254. Petitioner has consented to the jurisdiction of the United States Magistrate Judge.
17 (ECF No. 6).

18 **I.**

19 **BACKGROUND**

20 On August 3, 2017, Petitioner filed the instant federal habeas petition, seeking to obtain
21 the benefits of Proposition 57. (ECF No. 1). On September 7, 2017, the Court ordered Petitioner
22 to show cause why the petition should not be dismissed for failure to exhaust state judicial
23 remedies. (ECF No. 5). On October 12, 2017, Petitioner filed his response. (ECF No. 8).

24 **II.**

25 **DISCUSSION**

26 **A. Exhaustion**

27 Rule 4 of the Rules Governing Section 2254 Cases requires preliminary review of a
28 habeas petition and allows a district court to dismiss a petition before the respondent is ordered

1 to file a response, if it “plainly appears from the petition and any attached exhibits that the
2 petitioner is not entitled to relief in the district court.”

3 A petitioner in state custody who is proceeding with a petition for writ of habeas corpus
4 must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based
5 on comity to the state court and gives the state court the initial opportunity to correct the state’s
6 alleged constitutional deprivations. Coleman v. Thompson, 501 U.S. 722, 731 (1991); Rose v.
7 Lundy, 455 U.S. 509, 518 (1982). A petitioner can satisfy the exhaustion requirement by
8 providing the highest state court with a full and fair opportunity to consider each claim before
9 presenting it to the federal court. O’Sullivan v. Boerckel, 526 U.S. 838, 845 (1999); Duncan v.
10 Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971).

11 The petition states that Petitioner did not seek review in the California Supreme Court.
12 (ECF No. 1 at 4).¹ Additionally, in response to the question of whether this petition might
13 lawfully have been made to a lower court, Petitioner writes, “Only court I’m aware of that I need
14 to go to.” (Id. at 5). In his response to the order to show cause, Petitioner states that “to [his]
15 understanding the petition . . . was a ‘state habeas corpus’ petition MC-275 to the state court not
16 to the federal court.” (ECF No. 8). Although the instant petition was on the MC-275 California
17 state form, Petitioner mailed the petition to this Court, the United States District Court for the
18 Eastern District of California. If Petitioner has not sought relief in the California Supreme Court,
19 this Court cannot proceed to the merits of Petitioner’s claim. 28 U.S.C. § 2254(b)(1).
20 Accordingly, the petition must be dismissed without prejudice for failure to exhaust state judicial
21 remedies.

22 **B. Certificate of Appealability**

23 A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a
24 district court’s denial of his petition, and an appeal is only allowed in certain circumstances.
25 Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003). The controlling statute in determining
26 whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides as follows:
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28 ¹ Page numbers refer to the ECF page numbers stamped at the top of the page.

1 (a) In a habeas corpus proceeding or a proceeding under section
2 2255 before a district judge, the final order shall be subject to
3 review, on appeal, by the court of appeals for the circuit in which
4 the proceeding is held.

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

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

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

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

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

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

23 If a court denies habeas relief on procedural grounds without reaching the underlying
24 constitutional claims, the court should issue a certificate of appealability “if jurists of reason
25 would find it debatable whether the petition states a valid claim of the denial of a constitutional
26 right and that jurists of reason would find it debatable whether the district court was correct in its
27 procedural ruling.” Slack v. McDaniel, 529 U.S. 473, 484 (2000). “Where a plain procedural bar
28 is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist
could not conclude either that the district court erred in dismissing the petition or that the
petitioner should be allowed to proceed further.” Id.

In the present case, the Court finds that reasonable jurists would not find the Court's
determination that Petitioner's federal habeas corpus petition should be dismissed debatable or
wrong, or that Petitioner should be allowed to proceed further. Therefore, the Court declines to
issue a certificate of appealability.

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