

1
2
3 **UNITED STATES DISTRICT COURT**
4 **EASTERN DISTRICT OF CALIFORNIA**
5

6 **ROY RUSS,**

7 **Plaintiff**

8 v.

9 **BRANDON PRICE,**

10 **Defendant**

CASE NO. 1:18-CV-1154 AWI JDP (HC)

**ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS, ORDER
GRANTING MOTION TO DISMISS, and
ORDER DECLINING TO ISSUE
CERTIFICATE OF APPEALABILITY**

(Doc. Nos. 24, 29)

11
12
13 Petitioner is a civil detainee proceeding *pro se* with a petition for writ of habeas corpus that
14 is ostensibly brought pursuant to 28 U.S.C. § 2241. On May 15, 2020, the Magistrate Judge issued
15 Findings and Recommendation (“F&R”) that recommended granting Respondent’s motion to
16 dismiss the petition as untimely. See Doc. No. 29. Specifically, the F&R found that the petition
17 was appropriately classified as one brought pursuant to 28 U.S.C. § 2254 and that Petitioner had
18 failed to meet the one year limitations period of 28 U.S.C. § 2244(d). See id. On June 5, 2020,
19 Petitioner filed objections. See Doc. No. 30.

20 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this Court has conducted a
21 *de novo* review of the case. Having carefully reviewed the entire file, including Petitioner’s
22 objections, the Court concludes that the Findings and Recommendation is supported by the record
23 and proper analysis. Contrary to Petitioner’s objections, his petition is properly reviewed under 28
24 U.S.C. § 2254. See Huftile v. Miccio-Fonseca, 410 F.3d 1136, 1139-40 (9th Cir. 2005); Russ v.
25 King, 2016 U.S. Dist. LEXIS 129607, *2 (E.D. Cal. Sept. 21, 2016); Padilla v. King, 2014 U.S.
26 Dist. LEXIS 183948, *6-*7 (C.D. Cal. Aug. 15, 2014); Carmony v. Mayberg, 2011 U.S. Dist.
27 LEXIS 3470, *4 (Jan. 10, 2011). Therefore, the Court will overrule Petitioner’s objections and
28 adopt the F&R.

1 A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a
2 district court's denial of his petition, and an appeal is only allowed in certain circumstances. Miller-
3 El v. Cockrell, 537 U.S. 322, 335–36 (2003). The controlling statute in determining whether to issue
4 a certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

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

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

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

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

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

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

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

27 If a court denies habeas relief on procedural grounds without reaching the underlying
28 constitutional claims, the court should issue a certificate of appealability “if jurists of reason would
find it debatable whether the petition states a valid claim of the denial of a constitutional right and
that jurists of reason would find it debatable whether the district court was correct in its procedural
ruling.” Slack v. McDaniel, 529 U.S. 473, 484 (2000). “Where a plain procedural bar 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.

1 In the present case, reasonable jurists would not find the Court's determination that
2 Petitioner's habeas petition should be dismissed debatable or wrong, or that Petitioner should be
3 allowed to proceed further. Therefore, the Court declines to issue a certificate of appealability.
4

5 **ORDER**

6 Accordingly, IT IS HEREBY ORDERED that:

- 7 1. The Findings and Recommendation issued on May 15, 2020 (Doc. No. 29) is ADOPTED
8 IN FULL;
9 2. Respondent's motion to dismiss (Doc. No. 24) is GRANTED;
10 3. The petition for writ of habeas corpus is DISMISSED as untimely;
11 4. The Clerk is directed to CLOSE this case; and
12 5. The Court DECLINES to issue a certificate of appealability.

13 IT IS SO ORDERED.

14 Dated: November 16, 2020

15 
16 _____
17 SENIOR DISTRICT JUDGE
18
19
20
21
22
23
24
25
26
27
28