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8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**
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11 RAFAEL HERNANDEZ-CARILLO,

12 Petitioner,

13 v.

14 STEVEN LAKE,

15 Respondent.

Case No. 1:19-cv-00253-LJO-SAB-HC

ORDER ADOPTING FINDINGS AND
RECOMMENDATION, DISMISSING
PETITION FOR WRIT OF HABEAS
CORPUS, DIRECTING CLERK OF COURT
TO CLOSE CASE, AND DECLINING TO
ISSUE A CERTIFICATE OF
APPEALABILITY

(ECF No. 7)

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18 Petitioner is a federal prisoner proceeding pro se with a petition for writ of habeas corpus
19 pursuant to 28 U.S.C. § 2241. On April 3, 2019, the Magistrate Judge issued Findings and
20 Recommendation that recommended dismissing the petition for lack of jurisdiction because
21 Petitioner failed to meet the criteria to bring a § 2241 habeas petition under the escape hatch or
22 savings clause of § 2255(e). (ECF No. 7). The Findings and Recommendation was served
23 petitioner and contained notice that any objections were to be filed within thirty (30) days of the
24 date of service of the Findings and Recommendation. On May 16, 2019, the Court received
25 Petitioner’s objections.¹ (ECF No. 8).

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28 ¹ Attached to the objections is a memorandum issued by the United States Penitentiary in Atwater, California, indicating that the facility was in lockdown status from March 24, 2019 until April 29, 2019, “which may have caused delays in preparation and/or submission of legal documents in a timely manner.” (Doc. No. 8 at 3).

1 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this Court has conducted
2 a de novo review of the case. Having carefully reviewed the entire file, including Petitioner’s
3 objections, the Court concludes that the Findings and Recommendation is supported by the
4 record and proper analysis. As Petitioner concedes in his objections, Petitioner cannot meet the
5 actual innocence standard articulated by the Supreme Court in Bousley v. United States, 523
6 U.S. 614 (1998), with respect to a conviction. (ECF No. 8 at 2). To the extent Petitioner asserts
7 that he is actually innocent of his sentence, the Court notes that the Ninth Circuit has “not yet
8 resolved the question whether a petitioner may ever be actually innocent of a noncapital sentence
9 for the purpose of qualifying for the escape hatch.” Marrero v. Ives, 682 F.3d 1190, 1193 (9th
10 Cir. 2012).

11 “Where a petition purportedly brought under § 2241 is merely a ‘disguised’ § 2255
12 motion, the petitioner cannot appeal from the denial of that petition without a [certificate of
13 appealability].” Harrison v. Ollison, 519 F.3d 952, 958 (9th Cir. 2008). The controlling statute in
14 determining whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides as
15 follows:

16 (a) In a habeas corpus proceeding or a proceeding under section
17 2255 before a district judge, the final order shall be subject to
18 review, on appeal, by the court of appeals for the circuit in which
the proceeding is held.

19 (b) There shall be no right of appeal from a final order in a
20 proceeding to test the validity of a warrant to remove to another
21 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.

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

24 (A) the final order in a habeas corpus proceeding in which
25 the detention 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)
28 only if the applicant has made a substantial showing of the
denial of a constitutional right.

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

3 28 U.S.C. § 2253.

4 A court should issue a certificate of appealability if “reasonable jurists could debate
5 whether (or, for that matter, agree that) the petition should have been resolved in a different
6 manner or that the issues presented were ‘adequate to deserve encouragement to proceed
7 further.’” Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting Barefoot v. Estelle, 463 U.S.
8 880, 893 & n.4 (1983)). In the present case, the Court finds that reasonable jurists would not find
9 the Court’s determination that Petitioner’s federal habeas corpus petition should be dismissed
10 debatable or wrong, or that Petitioner should be allowed to proceed further. Therefore, the Court
11 declines to issue a certificate of appealability.

12 Accordingly, IT IS HEREBY ORDERED that:

- 13 1. The Findings and Recommendation issued on April 3, 2019 (ECF No. 7) is
14 ADOPTED;
15 2. The petition for writ of habeas corpus is DISMISSED;
16 3. The Clerk of Court is directed to CLOSE the case; and
17 4. The Court DECLINES to issue a certificate of appealability.

18 IT IS SO ORDERED.
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20 Dated: September 30, 2019

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