

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

RICHARD HARMON, JR.,  
Petitioner,  
v.  
MIKE KNOWLES,  
Respondent.

No. CV-06-2572-FVS

ORDER DENYING CERTIFICATE  
OF APPEALABILITY

MIKE KNOWLES,  
Respondent.

**THIS MATTER** comes before the Court based upon petitioner's motion  
a Certificate of Appealability. For the reasons set forth below,  
motion is denied.

## BACKGROUND

Richard Harmon, Jr., was convicted of second degree murder, robbery, and arson in San Joaquin County Superior Court in the State of California. He appealed the judgment of conviction. The state Court of Appeal affirmed his conviction and the state Supreme Court denied review. Mr. Harmon filed a petition for a writ of habeas corpus in state Superior Court. He raised two issues he had not raised during the course of his direct appeal. For one thing, he argued the trial judge improperly refused to excuse a juror. For another thing, he argued the judge improperly admitted statements he

1 made to a law enforcement officer in response to custodial  
2 interrogation. Since Mr. Harmon had raised these issues for the first  
3 time in a state habeas petition, neither the Superior Court, nor the  
4 Court of Appeal, nor the Supreme Court would consider them. As a  
5 result, Mr. Harmon turned to federal court; filing a petition for a  
6 writ of habeas corpus pursuant to 28 U.S.C. § 2254. He asserted  
7 issues the California courts had refused to consider as a result of  
8 his failure to comply with state procedural rules. This Court denied  
9 habeas relief on the ground he had defaulted his federal claims in  
10 state court pursuant to an independent and adequate state procedural  
11 rule. *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115  
12 L.Ed.2d 640 (1991). Mr. Harmon now seeks a certificate of  
13 appealability ("COA"). 28 U.S.C. § 2253(c).  
14

16 **STANDARD**

17 Mr. Harmon must demonstrate "'reasonable jurists would find [this  
18 Court's] assessment of the constitutional claims debatable or wrong.'" *Miller-El v. Cockrell*, 537 U.S. 322, 338, 123 S.Ct. 1029, 154 L.Ed.2d  
19 931 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct.  
20 1595, 146 L.Ed.2d 542 (2000)). This is a lenient standard. *Hayward  
21 v. Marshall*, 603 F.3d 546, 553 (9th Cir.2010) (en banc). In order to  
22 satisfy it, Mr. Harmon must show "something more than the absence of  
23 frivolity, but something less than a merits determination[.]" *Id.*  
24 (internal punctuation and citations omitted).  
25  
26

1                   **RULING**

2                   Mr. Harmon does not appear to deny he raised the disputed issues  
3 for the first time in his state habeas petition and, by doing so,  
4 violated a state procedural rule. These combined circumstances create  
5 a substantial obstacle to federal habeas relief. "A federal claim  
6 that is defaulted in state court pursuant to an adequate and  
7 independent procedural bar may not be considered in federal court  
8 unless the petitioner demonstrates cause and prejudice for the  
9 default, or shows that a fundamental miscarriage of justice would  
10 result if the federal court refused to consider the claim." *Cassett*  
11 *v. Stewart*, 406 F.3d 614, 621 n.5 (9th Cir.2005) (citing *Coleman*, 501  
12 U.S. at 750, 111 S.Ct. 2546). Mr. Harmon has not attempted to  
13 establish cause and prejudice. Thus, he is entitled to a COA only if  
14 a reasonable jurist could find this Court's failure to consider his  
15 federal habeas claims would result in a fundamental miscarriage of  
16 justice. In *Cook v. Schriro*, 538 F.3d 1000, 1028 (9th Cir.2008), the  
17 Ninth Circuit explained:

18                   To qualify for the "fundamental miscarriage of justice"  
19 exception to the procedural default rule . . ., [the  
20 petitioner] must show that a constitutional violation has  
21 "probably resulted" in the conviction when he was "actually  
22 innocent" of the offense. *Murray [v. Carrier*, 477 U.S. 478,  
23 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986).] "To be  
24 credible, such a claim requires petitioner to support his  
25 allegations of constitutional error with new reliable  
26 evidence -- whether it be exculpatory scientific evidence,

trustworthy eye-witness accounts, or critical physical evidence -- that was not presented at trial." *Schlup* [v. *Delo*, 513 U.S. 298, 324, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995).]

Mr. Harmon has presented no evidence of actual innocence. That being the case, a reasonable jurist would be unable to find he has satisfied the "fundamental miscarriage of justice" exception to the procedural default rule. Accordingly, he is not entitled to a COA.

**IT IS HEREBY ORDERED:**

Petitioner Richard Harmon's motion for a certificate of appealability (**Ct. Rec. 16**) is **denied**. The Court will not consider a motion for reconsideration.

**IT IS SO ORDERED.** The District Court Executive is hereby directed to enter this order and furnish copies to the petitioner and to counsel for the respondent.

**DATED** this 19th day of July, 2010.

s/ Fred Van Sickle  
Fred Van Sickle  
Senior United States District Judge