

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF CALIFORNIA

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4
5 RICHARD HARMON, JR.,
6 Petitioner,
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8 v.
9 MIKE KNOWLES,
10 Respondent.

No. CV-06-2572-FVS

ORDER DENYING CERTIFICATE
OF APPEALABILITY

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

15 **BACKGROUND**

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

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

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

4 Mr. Harmon has presented no evidence of actual innocence. That being
5 the case, a reasonable jurist would be unable to find he has satisfied
6 the "fundamental miscarriage of justice" exception to the procedural
7 default rule. Accordingly, he is not entitled to a COA.
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9 **IT IS HEREBY ORDERED:**

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

13 **IT IS SO ORDERED.** The District Court Executive is hereby
14 directed to enter this order and furnish copies to the petitioner and
15 to counsel for the respondent.
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17 **DATED** this 19th day of July, 2010.

18 s/ Fred Van Sickle
19 Fred Van Sickle
20 Senior United States District Judge
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