

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

EDDIE ORTIZ, JR.,

Petitioner,

2: 08 - cv - 2165 JAM TJB

vs.

JAMES A. YATES,

Respondent.

ORDER

_____/

Petitioner, a state prisoner proceeding *pro se*, has filed a motion for a certificate of appealability along with his notice of appeal. On November 5, 2010, the United States Magistrate Judge assigned to this matter filed findings and recommendations which was served on Petitioner, and which advised Petitioner that in any objections he elected to file, he may address whether a certificate of appealability should issue in the event he elected to file an appeal from the judgment in this case. On November 22, 2010, Petitioner filed objections to the findings and recommendations.

On January 14, 2011, the undersigned issued an order adopting the findings and recommendations in full and declined to issue a certificate of appealability.

A certificate of appealability may issue under 28 U.S.C. § 2253 “only if the applicant had

1 made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The
2 court must either issue a certificate of appealability indicating which issues satisfy the required
3 showing, or state the reasons why such a certificate should not issue. See Fed. R. App. P. 22(b).
4 A certificate of appealability should be granted for any issue that petitioner can demonstrate is
5 “debatable among jurists of reason,” could be resolved differently by a different court, or is
6 “adequate to deserve encouragement to proceed further.” Jennings v. Woodford, 290 F.3d
7 1006, 1010 (9th Cir. 2002) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).

8 Petitioner argues that the following issues should be granted a certificate of appealability:

- 9 1. Whether the district court erred in failing to grant an evidentiary hearing on
10 Petitioner’s claim of right to counsel of choice and conflict with counsel
11 (structural error).
- 12 2. Whether the district court erred in failing to grant an evidentiary hearing on
13 Petitioner’s claim of ineffective assistance of counsel as regards to counsel’s
14 failure to investigate/interview alibi witnesses, the failure to present witnesses for
15 his defense, a competent pre-trial investigation.
- 16 3. Whether, with regard to Petitioner’s claim that trial counsel wrongly misadvised
17 Petitioner to waive jury trial rights.
- 18 4. Whether the District Court erred in failing to grant an evidentiary hearing on
19 Petitioner’s claim of actual innocence.
- 20 5. Whether, with regard to Petitioner’s claim that the court wrongly convicted
21 Petitioner on the insufficiency of the evidence regarding the great bodily injury
22 and attempted murder findings.

23 (Dkt. No. 35 at p. 2.)

24 Petitioner fails to demonstrate that any of these arguments are “debatable among jurists
25 of reason,” could be resolved differently by a different court, or are “adequate to deserve
26 encouragement to proceed further.” Jennings, 290 F.3d at 1010. First, a court presented with a

