

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

MICHAEL RAY ROGERS, No. CIV S-10-2656-CMK-F

Petitioner,

ORDER

M. MARTELL,

Respondent.

3.
TELL,
Respondent.

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Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner has consented to Magistrate Judge pursuant to 28 U.S.C. § 636(c) and no other party has been served or appeared in the proceeding before the court is petitioner's petition for a writ of habeas corpus (Doc. 1).

21 On October 29, 2010, the court directed petitioner to show cause in writing why
22 this petition should not be summarily dismissed for failure to exhaust his state court remedies. In
23 response, petitioner filed a document he titled a request for voluntary dismissal pursuant to
24 Federal Rule of Civil Procedure 4(a)(1). In this document, he states that he has a mental health
25 issues, including Bi-Polar disorder, and restates his request for appointment of counsel. He does
26 not, however, address the reasons the undersigned set forth for dismissing this action.

1 As to plaintiff's request for counsel, there currently exists no absolute right to
2 appointment of counsel in habeas proceedings. See Nevius v. Sumner, 105 F.3d 453, 460 (9th
3 Cir. 1996). However, 18 U.S.C. § 3006A authorizes the appointment of counsel at any stage of
4 the case "if the interests of justice so require." See Rule 8(c), Fed. R. Governing § 2254 Cases.
5 In the present case, the court does not find that the interests of justice would be served by the
6 appointment of counsel.

7 Because petitioner has not exhausted his state court remedies, his petition is
8 unexhausted, and is subject to summary dismissal under Rule 4 of the Federal Rules Governing
9 Section 2254 Cases.

10 Pursuant to Rule 11(a) of the Federal Rules of Governing Section 2254 Cases, the
11 court has considered whether to issue a certificate of appealability. Before petitioner can appeal
12 this decision, a certificate of appealability must issue. 28 U.S.C. § 2253(c); Fed. R. App. P.
13 22(b). A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the applicant has
14 made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The
15 court must either issue a certificate of appealability indicating which issues satisfy the required
16 showing or must state the reasons why such a certificate should not issue. Fed. R. App. P. 22(b).

17 Where, as here, the petition was dismissed on procedural grounds, a certificate of
18 appealability "should issue if the prisoner can show: (1) 'that jurists of reason would find it
19 debatable whether the district court was correct in its procedural ruling'; and (2) 'that jurists of
20 reason would find it debatable whether the petition states a valid claim of the denial of a
21 constitutional right.'" Morris v. Woodford, 229 F.3d 775, 780 (9th Cir. 2000) (quoting Slack v.
22 McDaniel, 529 U.S. 473, 120 S. Ct. 1595, 1604 (2000)). After careful review of the entire record
23 herein, this court finds that petitioner has not satisfied the first requirement for issuance of a
24 certificate of appealability in this case. Specifically, there is no showing that jurists of reason
25 would find it debatable whether petitioner exhausted the claims raised in the petition.

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1 Accordingly, IT IS HEREBY ORDERED that:

2 1. Petitioner's petition for a writ of habeas corpus (Doc. 1) is summarily
3 dismissed, without prejudice;
4 2. Petitioner's request for the appointment of counsel is denied;
5 3. The court declines to issue a certificate of appealability; and
6 4. The Clerk of the Court is directed to enter judgment and close this case.

7

8 DATED: April 29, 2011

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10 CRAIG M. KELLISON
11 UNITED STATES MAGISTRATE JUDGE