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

TONY RICHARD LOW,
Petitioner,

No. CIV S-11-0029-CMK-P

vs.

ORDER

S.M. SALINAS,
Respondent.

_____ /

Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pursuant to the written consent of all parties, this case is before the undersigned as the presiding judge for all purposes, including entry of final judgment. See 28 U.S.C. § 636(c). Pending before the court is respondent’s motion to dismiss (Doc. 12).

Respondent argues that the court should abstain from hearing petitioner’s claims at this time under Younger v. Harris, 401 U.S. 37 (1971). In particular, respondent notes that petitioner’s direct appeal of his conviction and sentence is still pending in the California Court of Appeal. The court agrees with respondent that this action should be dismissed as premature. See Sherwood v. Tomkins, 716 F.2d 632, 634 (9th Cir. 1983) (holding that a “would-be habeas

1 corpus petitioner must await the outcome of his appeal. . . .”).

2 Pursuant to Rule 11(a) of the Federal Rules Governing Section 2254 Cases, the
3 court has considered whether to issue a certificate of appealability. Before petitioner can appeal
4 this decision, a certificate of appealability must issue. See 28 U.S.C. § 2253(c); Fed. R. App. P.
5 22(b). Where the petition is denied on the merits, a certificate of appealability may issue under
6 28 U.S.C. § 2253 “only if the applicant has made a substantial showing of the denial of a
7 constitutional right.” 28 U.S.C. § 2253(c)(2). The court must either issue a certificate of
8 appealability indicating which issues satisfy the required showing or must state the reasons why
9 such a certificate should not issue. See Fed. R. App. P. 22(b). Where the petition is dismissed
10 on procedural grounds, a certificate of appealability “should issue if the prisoner can show: (1)
11 ‘that jurists of reason would find it debatable whether the district court was correct in its
12 procedural ruling’; and (2) ‘that jurists of reason would find it debatable whether the petition
13 states a valid claim of the denial of a constitutional right.’” Morris v. Woodford, 229 F.3d 775,
14 780 (9th Cir. 2000) (quoting Slack v. McDaniel, 529 U.S. 473, 120 S.Ct. 1595, 1604 (2000)).
15 For the reasons set forth above, the court finds that issuance of a certificate of appealability is not
16 warranted in this case.

17 Accordingly, IT IS HEREBY ORDERED that:

- 18 1. Respondent’s motion to dismiss (Doc. 12) is granted;
- 19 2. This action is dismissed without prejudice;
- 20 3. The court declines to issue a certificate of appealability; and
- 21 4. The Clerk of the Court is directed to enter judgment and close this file.

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23 DATED: June 22, 2011

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25 **CRAIG M. KELLISON**
26 UNITED STATES MAGISTRATE JUDGE