

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
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TARRANCE VICKERS,
Petitioner,
v.
RICK HILL,
Respondent.

No. 2:14-cv-01425 JAM DB

ORDER

Petitioner, a state prisoner proceeding pro se, has timely filed a notice of appeal of this court's March 27, 2017 dismissal of his application for a writ of habeas corpus. Before petitioner can appeal this decision, a certificate of appealability must issue. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

A certificate of appealability may issue under 28 U.S.C. § 2253 “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The certificate of appealability must “indicate which specific issue or issues satisfy” the requirement. 28 U.S.C. § 2253(c)(3).

A certificate of appealability should be granted for any issue that petitioner can demonstrate is “debatable among jurists of reason,” could be resolved differently by a different court, or is “adequate to deserve encouragement to proceed further.” Jennings v. Woodford, 290 F.3d 1006, 1010 (9th Cir. 2002) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).

1 Petitioner has made a substantial showing of the denial of a constitutional right in the
2 following issue(s) presented in the instant petition:

3 Whether a prisoner retains a liberty interest in good time credits that have been lost but are
4 still capable of restoration.

5 As the court noted in the adopted findings and recommendations, this question has not
6 been addressed by the Ninth Circuit or the Supreme Court. (ECF No. 25 at 5 n. 1). A district
7 judge in the Eastern District of California addressed this question in Reed v. Knipp, No. CIV-S-
8 11-2753 KJM KJN, 2012 WL 6570906 (E.D. Cal. Dec. 17, 2012), reaching the same conclusion
9 as this court; however, the Reed opinion was not appealed. Furthermore, as also noted in the
10 findings and recommendations, the California Attorney General has taken diametrically opposing
11 positions on this question in different cases.

12 Specifically, in In re Gomez, 246 Cal. App. 4th 1082, 1093 (2016), a state court habeas
13 matter, the state argued that a prisoner could not challenge the loss of good time credits still
14 capable of restoration, because (as paraphrased by the court) the prisoner “has not really lost any
15 credits, and cannot allege that he has suffered any deprivation of liberty that warrants due process
16 scrutiny.” Under this interpretation, a prisoner cannot challenge the loss of good time credits
17 until the possibility of restoration is extinguished -- thus, according to the logic of the state’s
18 argument in Gomez, the action that terminated the possibility of restoration would be the event
19 that triggers a loss of a liberty interest. This is contrary to the argument respondent made in this
20 case, as well as contrary to the conclusion the court reached. In light of this, the undersigned
21 finds that petitioner has made a substantial showing of the denial of a constitutional right
22 concerning this issue.

23 Accordingly, IT IS HEREBY ORDERED that a certificate of appealability is issued in the
24 present action.

25 DATED: May 26, 2017

/s/ John A. Mendez

UNITED STATES DISTRICT COURT JUDGE