

1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF CALIFORNIA

3  
4 CARLOS A. ESPINOZA,  
5 Petitioner,  
6 v.  
7 W. L. MONTGOMERY, Warden,  
8 Respondent.

Case No. [17-cv-02159-YGR](#) (PR)

**ORDER DIRECTING FILING OF  
NOTICE OF APPEAL; AND DENYING  
AS MOOT PETITIONER'S REQUEST  
FOR EXTENSION OF TIME TO FILE  
CERTIFICATE OF APPEALABILITY**

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10 Petitioner, a state prisoner, filed a *pro se* petition for a writ of habeas corpus pursuant to 28  
11 U.S.C. § 2254. On July 24, 2018, the Court entered an order and judgment denying the petition on  
12 the merits. Dkts. 22, 23. Thereafter, on August 23, 2018,<sup>1</sup> Petitioner filed a document entitled,  
13 “Application for Extension of Time to File Petitioner[’]s COA,” in which he requests an extension  
14 of time to file a certificate of appealability (“COA”).

15 As a preliminary matter, Petitioner seeks additional time to file a COA, but has not filed a  
16 separate notice of appeal. However, any document that clearly evinces an intent to appeal and is  
17 otherwise sufficient under Federal Rule of Appellate Procedure 3(c) may be construed as the  
18 functional equivalent of a notice of appeal. *See Smith v. Barry*, 502 U.S. 244, 245 (1992).  
19 Petitioner’s aforementioned motion evinces an intent to appeal and is otherwise sufficient to be  
20 considered a notice of appeal. *See Smith*, 502 U.S. at 248; Fed. R. App. P. 3(c); *cf. Tinsley v.*  
21 *Borg*, 895 F.2d 520, 523 (9th Cir. 1990) (treating timely *pro se* motion for a certificate of probable  
22 cause as a timely notice of appeal), *cert. denied*, 498 U.S. 1091 (1991). Therefore, the Court  
23 construes Petitioner’s pending motion as a notice of appeal. The Court further notes that an appeal  
24 of right may be taken only by filing a valid notice of appeal in the district court within the time

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26 <sup>1</sup> Petitioner’s motion has a signature date of August 23, 2018 and was stamped “filed” at  
27 the Court on August 27, 2018. As a *pro se* prisoner, Petitioner receives the benefit of the prisoner  
28 mailbox rule, which deems most documents filed when the prisoner gives them to prison officials  
to mail to the court. *See Stillman v. LaMarque*, 319 F.3d 1199, 1201 (9th Cir. 2003). The Court  
will assume he gave the motion to prison officials for mailing on the date he signed it, i.e., August  
23, 2018, and deem the motion filed as of that date.

1 allowed by Fed. R. App. P. (“FRAP”) 4. *See* FRAP 3(a)(1). The notice of appeal must be filed  
2 within thirty days after judgment is entered. *See* FRAP 4(a)(1). Under these rules, a notice of  
3 appeal be filed in this action within thirty days of July 24, 2018 (the day judgment was entered),  
4 that is, on or before August 23, 2018.

5 Here, Petitioner’s motion was signed on August 23, 2018, which is exactly on the deadline  
6 and is therefore timely under FRAP 4(a)(1). Therefore, the Clerk of the Court is directed to file  
7 Docket No. 24 as a notice of appeal, with a filing date of August 23, 2018.

8 Finally, as mentioned above, Petitioner requests an extension to file a COA. Federal Rule  
9 of Civil Procedure 6(b) allows the district court to extend the time for taking any action that is  
10 required to be done within a specified time under the Federal Rules or a court order. There is no  
11 time limit for requesting a COA. *See* 28 U.S.C. § 2253(c). In any event, in its July 24, 2018  
12 Order, the Court declined to issue a COA as to Petitioner’s claims. Dkt. 22 at 30. Therefore, there  
13 is no need for Petitioner to file a COA in this Court, a fact which renders moot his request for an  
14 extension of time to do so. Accordingly, Petitioner’s request for an extension of time to file a  
15 COA is DENIED as moot.

16 **CONCLUSION**

17 For the reasons outlined above, the Court orders as follows:

- 18 1. Petitioner’s “Application for Extension of Time to File Petitioner[’]s COA” is  
19 construed as a notice of appeal. The Clerk is directed to file Docket No. 24 as a notice of appeal,  
20 with a filing date of August 23, 2018.
- 21 2. Petitioner’s request for an extension of time to file a COA is DENIED as moot.  
22 Dkt. 24.
- 23 3. This Order terminates Docket No. 24.

24 IT IS SO ORDERED.

25 Dated: September 24, 2018

26   
27 YVONNE GONZALEZ ROGERS  
28 United States District Judge