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E-FILED - 8/7/09

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

KYRON L. HIGHTOWER,
Petitioner,
v.
TOM FELKER, Warden
Respondent.

No. C 07-1338 RMW (PR)

**ORDER DENYING
PETITIONER'S APPLICATION
FOR CERTIFICATE OF
APPEALABILITY**

(Docket No. 44)

Petitioner filed a *pro se* habeas petition. Following briefing by the parties, this court denied the petition on the merits and entered judgment on March 18, 2009. Petitioner filed a timely notice of appeal and a timely application for a certificate of appealability ("COA"). In his application for COA, petitioner asks the court to consider his limited mental ability. Petitioner attaches a 2003 report by a psychiatrist regarding petitioner's mental issues.

A court shall grant a COA "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 must indicate which issues satisfy this standard, *see id.* § 2253(c)(3), and the court of appeals is limited to considering only those claims. *See Hiivala v. Wood*, 195 F.3d 1098, 1103 (9th Cir. 1999); *Fuller v. Roe*, 182 F.3d 699, 702-03 (9th Cir. 1999). "Where a district court has rejected the

1 constitutional claims on the merits, the showing required to satisfy § 2253(c) is
2 straightforward: the petitioner must demonstrate that reasonable jurists would find the district
3 court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529
4 U.S. 473, 484 (2000).

5 In this case, the court finds that petitioner has not made a substantial showing of the
6 denial of a constitutional right on any of his claims. None of the claims that petitioner raised
7 involved or were related to his limited mental ability. The court's order denying petition for
8 writ of habeas corpus issued on March 18, 2009 explained why petitioner's claims lacked
9 merit. Accordingly, the court will DENY petitioner a certificate of appealability (docket no.
10 44). Petitioner may, however, proceed to file a request for a certificate of appealability
11 directly with the Ninth Circuit. *See Nevius v. Sumner*, 105 F.3d 453, 458 (9th Cir. 1996).

12 IT IS SO ORDERED.

13 DATED: 8/5/09


RONALD M. WHYTE
United States District Judge