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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARK DARULIS,)	Civil No. 06cv1139-L(CAB)
)	
Petitioner,)	
)	ORDER DENYING CERTIFICATE
v.)	OF APPEALABILITY
)	
VINCENT J. IARIA,)	
)	
Respondent.)	
_____)	

Petitioner Mark Darulis, proceeding *pro se*, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (“Petition”). The case was referred to United States Magistrate Judge Cathy Ann Bencivengo for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and Civil Local Rule 72.1(d). The court adopted the Magistrate Judge’s Report and Recommendation to deny the Petition, and Petitioner filed a notice of appeal. Pursuant to 28 U.S.C. § 2253(c), a certificate of appealability (“COA”) is **DENIED**.

Title 28 U.S.C. § 2253 governs the appealability of habeas corpus petitions. It provides in pertinent part:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; . . .

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1 Although Petitioner filed a Notice of Appeal, he has not filed a request for a certificate of
2 appealability. Nevertheless, “[i]f an applicant files a notice of appeal, the district judge who
3 rendered the judgment must either issue a certificate of appealability or state why a certificate
4 should not issue.” Fed. R. App. Proc. 22(b)(1).

5 “A certificate of appealability should issue only if the petitioner has made a substantial
6 showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). “The COA determination
7 under §2253(c) requires an overview of the claims in the habeas petition and a general
8 assessment of their merits.” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). A COA is
9 authorized “if the applicant has made a substantial showing of the denial of a constitutional
10 right.” 28 U.S.C. § 2253(c)(2). “A petitioner satisfies this standard by demonstrating that jurists
11 of reason could disagree with the district court’s resolution of his constitutional claims or that
12 jurists could conclude the issues presented are adequate to deserve encouragement to proceed
13 further.” *Miller-El*, 537 U.S. at 327, citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).
14 Petitioner does not have to show “that he should prevail on the merits. He has already failed in
15 that endeavor.” *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 1983), citing *Barefoot v.*
16 *Estelle*, 463 U.S. at 880, 893 n.4 (1983)). Nevertheless, issuance of the COA “must not be pro
17 forma or a matter of course,” and a “prisoner seeking a COA must prove ‘something more than
18 the absence of frivolity’ or the existence of mere ‘good faith’ on his or her part.” *Miller-El*, 537
19 U.S. at 337-38, quoting *Barefoot*, 463 U.S. at 893).

20 Petitioner pled guilty to driving under the influence. In his Petition, he alleged ineffective
21 assistance of counsel in violation of the Sixth Amendment and violation of Due Process in that
22 his guilty plea was not knowing and voluntary. The ineffective assistance claim was denied
23 because a guilty plea precludes the claim. (See Order Adopting in Part and Remanding in Part
24 the Report and Recommendation, filed Aug. 26, 2008, at 2, citing *Tollett v. Henderson*, 411 U.S.
25 258, 267 (1973); *Moran v. Godinez*, 57 F.3d 690, 700 (9th Cir.1994), overruled on other grounds
26 in *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003).) Petitioner’s Due Process claim was based
27 largely on Petitioner’s assertion that the trial court failed to conduct a colloquy to ensure a
28 voluntary and knowing plea, which was negated by the record of the change of plea hearing.

1 (See Order Adopting in Part Report and Recommendation and Denying Petition with Prejudice,
2 filed December 1, 2008, at 2-3.)

3 Based on the foregoing, Petitioner has not made a substantial showing of the denial of a
4 constitutional right as required by 28 U.S.C. § 2253(c)(2). The court therefore declines to issue
5 a certificate of appealability.

6 **IT IS SO ORDERED.**

7
8 DATED: February 19, 2009

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11 M. James Lorenz
12 United States District Court Judge

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HON. CATHY ANN BENCIVENGO
UNITED STATES MAGISTRATE JUDGE

ALL PARTIES/COUNSEL