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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARK A. HARRIS,
Petitioner,
v.
TOMMY FELKER, Warden, *et al.*,
Respondents.

Civil No. 07CV2216 JAH (BLM)
**ORDER DENYING CERTIFICATE
OF APPEALABILITY**

On November 19, 2007, Petitioner Mark Harris, a state prisoner proceeding *pro se*, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to the Honorable Barbara Major, United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)B) and Local Rule HC.2(a). On May 23, 2008, Respondent filed an answer to the petition and Petitioner filed a traverse on August 18, 2008. Judge Major issued a report and recommendation (“report”) on August 21, 2008 denying the petition. Specifically, Judge Major found that the Court lacked jurisdiction to hear the petition. On September 11, 2008, Petitioner filed a general objection to the magistrates judge’s findings and conclusions contained in the report. This Court subsequently overruled Petitioner’s objection, adopted the report in its entirety and dismissed the petition for lack of jurisdiction. On November 4, 2009, Petitioner filed a “Notice of Appeal” and a “Request for Certificate of Appealability.” *See* Doc. No. 22.

A certificate of appealability is authorized “if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To meet this

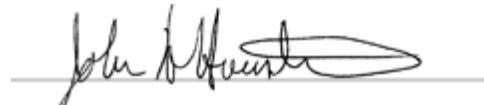
1 threshold showing, a petitioner must show : (1) the issues are debatable among jurists of
2 reason; or (2) that a court could resolve the issues in a different manner; or (3) that the
3 questions are adequate to deserve encouragement to proceed further. Lambright v.
4 Stewart, 220 F.3d 1022, 1024-25 (9th Cir. 2000)(citing Slack v. McDaniel, 529 U.S. 473
5 (2000) and Barefoot v. Estelle, 463 U.S. 880 (1983)).

6 Here, Petitioner appeals this Court's order dismissing the petition for writ of habeas
7 corpus for lack of jurisdiction. In overruling Petitioner's objections and dismissing the
8 petition, this Court agreed with the magistrate judge's determination that the Court lacked
9 jurisdiction to hear the petition. Specifically, the magistrate judge found that at the time
10 of the petition, Petitioner was not in custody under the challenged sentence or conviction.
11 Therefore, this Court adopted the magistrate judge's recommendation and dismissed the
12 petition for lack of jurisdiction.

13 This Court finds that a certificate of appealability is not warranted in this instance
14 because the dismissal of the petition under the circumstances here is not an issue debatable
15 among jurists of reason nor could any other court resolve the issue in a different manner.
16 Lambright, 220 F.3d at 1024-25. Accordingly, this Court **DENIES** a certificate of
17 appealability in this case.

18 **IT IS SO ORDERED.**

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20 DATED: November 16, 2009

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22 JOHN A. HOUSTON
23 United States District Judge
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