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FILED
2009 APR -6 AM 9:37
CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY: 

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ANTHONY ANDRE SHARP,

Petitioner,

vs.

M. MARTEL, Warden, *et al.*,

Respondents.

CASE NO. 08cv1527 BEN (CAB)
**ORDER DENYING CERTIFICATE
OF APPEALABILITY**

[Dkt. No. 38.]

Petitioner Anthony Andre Sharp, a state prisoner proceeding *pro se*, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Petitioner challenged his conviction in San Diego Superior Court for committing a lewd act upon a child under the age of fourteen. Dkt. No. 18. Respondent filed a Motion to Dismiss the Petition on November 7, 2008. Dkt. No. 28. Petitioner filed an Opposition to the Motion on November 21, 2008. Dkt. No. 31. On December 10, 2008, Magistrate Judge Cathy Ann Bencivengo issued a well-reasoned Report and Recommendation, recommending that Respondent's Motion to Dismiss be granted. Dkt. No. 32. Petitioner filed Objections to the Report and Recommendation on December 31, 2008. Dkt. No. 43. On March 17, 2009, after a *de novo* review, this Court adopted the Report and Recommendation and dismissed the Petition with prejudice. Dkt. No. 36. Petitioner filed a Notice of Appeal March 18, 2009. Dkt. No. 38.

1 A certificate of appealability is authorized "only if the applicant has made a substantial
2 showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To meet this standard,
3 Petitioner must show "that jurists of reason could disagree with the district court's resolution of his
4 constitutional claims or that jurists could conclude the issues presented are adequate to deserve
5 encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*
6 *v. McDaniel*, 529 U.S. 473, 484 (2000)). Petitioner does not have to show "that he should prevail
7 on the merits. He has already failed in that endeavor." *Lambright v. Stewart*, 220 F.3d 1022, 1025
8 (9th Cir. 2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

9 Ground One of the Petition was dismissed with prejudice for violating the one-year statute
10 of limitations period of 28 U.S.C. § 2244(d). The Petition was filed more than ten years late. As
11 discussed in the Report and Recommendation and this Court's Order adopting the Report and
12 Recommendation, Petitioner provided no basis for either statutory or equitable tolling.

13 Ground Two of the Petition was dismissed with prejudice because it did not present a basis
14 for federal habeas relief. This second ground did not challenge the legality of his custody or seek
15 a determination he was entitled to release, but rather claimed the California Department of
16 Corrections and Rehabilitation failed to deduct money from his prison account to pay his fine.

17 This Court has fully reviewed the legal issues raised by Petitioner and concludes that the
18 claims are not debatable among jurists of reason and do not deserve further encouragement.

19 Based on the foregoing, the Court **DENIES** a Certificate of Appealability.


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21 **IT IS SO ORDERED.**

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23 DATED: 4/05/09

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Hon. Roger T. Benitez
United States District Court Judge

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