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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ADRON BATES,

Petitioner,

v.

KEN CLARK, Warden,

Respondent.

Civil No. 08cv1625 JAH(PCL)

**ORDER DENYING CERTIFICATE
OF APPEALABILITY**

On September 4, 2008, petitioner, a state prisoner, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to the Honorable Peter C. Lewis, United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)B and Local Rule HC.2(a). Judge Lewis issued a report and recommendation (“report”) on May 7, 2009, recommending that this Court dismiss the petition, finding that the petitioner was not entitled to relief on his claims. Petitioner filed objections to the magistrate judge’s findings and conclusions contained in the report on June 9, 2009. This Court subsequently overruled petitioner’s objections, adopted the report in its entirety and dismissed the petition for not raising a claim entitled to relief.

On December 28, 2009, petitioner filed a notice of appeal of the Court’s order. Although petitioner does not expressly seek a certificate of appealability, this Court *sua sponte* considers whether a certificate of appealability should be granted. *See* Fed.R.App.P. 22(b); United States v. Asrar, 116 F.3d 1268, 1270 (9th Cir. 1997)(“If no express request is made for a certificate of appealability, the notice of appeal shall be

1 deemed to constitute a request for certificate).

2 A certificate of appealability is authorized “if the applicant has made a substantial
3 showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To meet this
4 threshold showing, petitioner must show that: (1) the issues are debatable among jurists
5 of reason; or (2) that a court could resolve the issues in a different manner; or (3) that the
6 questions are adequate to deserve encouragement to proceed further. Lambright v.
7 Stewart, 220 F.3d 1022, 1024-25 (9th Cir. 2000)(citing Slack v. McDaniel, 529 U.S. 473
8 (2000) and Barefoot v. Estelle, 463 U.S. 880 (1983)).

9 Here, the petitioner presents two issues: 1) whether petitioner was denied his rights
10 to Due Process and a fair trial because members of the jury saw the petitioner in jail
11 clothing; and 2) whether petitioner’s right to effective assistance of counsel as guaranteed
12 by the Sixth Amendment was violated when his attorney failed to object to his presence
13 at trial in jail clothing. As to petitioner’s first claim, a criminal defendant may not be
14 compelled to appear in front of a jury wearing identifiable prison clothing because it could
15 impair the presumption of innocence. Estelle v. Williams, 425 U.S. 501, 503 (1976);
16 United States v. Rogers, 769 F.2d 1418, 1423 (9th Cir. 1985). However, this Court
17 found that the petitioner’s failure to make a timely objection regarding his clothing during
18 the trial was sufficient to negate the presence of compulsion that is necessary to establish
19 a constitutional violation. *See* Doc. # 14 at 8-9 (citing Estelle, 425 U.S. at 512-13
20 (1976)).

21 As to petitioner’s alternative claim, this Court found that petitioner’s right to
22 effective counsel was not violated because petitioner did not show he was prejudiced by
23 his counsel’s failure to make an objection. *See* Doc # 14 at 12. Furthermore, this Court
24 found petitioner provided no proof there was a reasonable probability the outcome of his
25 trial would have been different had he been given a new set of civilian clothes. *See* Doc #
26 14 at 12. Because of the foregoing reasons, petitioner cannot show “a probability sufficient
27 to undermine confidence in the outcome [of the trial]” and therefore cannot prove a
28 violation of his right to effective counsel. Strickland v. Washington, 466 U.S. 668, 694

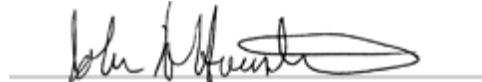
1 (1984).

2 This Court finds petitioner's claims do not present a question of substance
3 debatable among jurists, nor do the claims raise serious and substantial legal concerns that
4 implicate his constitutional rights. Lambright, 220 F.3d at 1024-25. Accordingly this
5 Court **DENIES** a certificate of appealability as to the claims presented.

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7 DATED: January 13, 2010

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JOHN A. HOUSTON
United States District Judge

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