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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT DANA,

NO. CIV. S-05-1480 LKK/DAD P

Petitioner,

v.

O R D E R

TERESA A. SCHWARTZ, Warden,

Respondent.

\_\_\_\_\_ /

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus. This petition challenges the March 10, 2004 decision of the California Board of Prison Terms (now the California Board of Parole Hearings) finding petitioner unsuitable for parole. On August 17, 2009, the magistrate judge filed findings and recommendations recommending that this petition be denied. This court adopted those findings and recommendations in full on September 29, 2009.

Petitioner has since filed an appeal. The Ninth Circuit recently held that appeal of denial of a habeas petition

1 challenging a parole decision required a certificate of  
2 appealability. Hayward v. Marshall, 603 F.3d 546, 554-55 (9th Cir.  
3 2010) (en banc).

4 "Where a district court has rejected the constitutional claims  
5 on the merits, the showing required to satisfy [28 U.S.C.] §  
6 2253(c) is straightforward: The petitioner must demonstrate that  
7 reasonable jurists would find the district court's assessment of  
8 the constitutional claims debatable or wrong." Slack v. McDaniel,  
9 529 U.S. 473, 484 (2000). In this case, the magistrate judge's  
10 findings and recommendations, which this court adopted in full,  
11 concluded that petitioner's lack of realistic parole plans,  
12 psychiatric reports indicating a high risk of substance abuse  
13 relapse, and the circumstances of his conviction provide some  
14 evidence of future dangerousness for purposes of federal habeas  
15 review. Although reasonable jurists may disagree about the  
16 appropriateness of reliance on the circumstances of the conviction  
17 offense and about federal court's ability to review such reliance  
18 in habeas, it does not appear that reasonable jurists would  
19 disagree that the totality of evidence exceeded the some evidence  
20 threshold. Nor could reasonable jurists disagree with the court's  
21 ex post facto analysis.

22 Accordingly, the court DECLINES to issue a certificate of  
23 appealability.

24 IT IS SO ORDERED.

25 DATED: July 2, 2010.

26

  
LAWRENCE K. KARLTON  
SENIOR JUDGE  
UNITED STATES DISTRICT COURT