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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

STANLEY KELLEY,

No. 2:05-cv-01713-MCE-DAD (HC)

Petitioner,

vs.

ORDER

J.D. STOKES, Acting Warden,

Respondent.

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Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On May 7, 2008, the previously assigned District Judge issued an Order that denied the petition for writ of habeas corpus on the merits. Petitioner filed a notice of appeal on May 21, 2008. This Court did not grant or deny a certificate of appealability, because prisoners challenging parole decisions via habeas corpus were not required to obtain said certificates pursuant to governing circuit court precedent. See White v. Lambert, 370 F.3d 1002, 1004 (9th Cir. 2004); Rosas v. Nielsen, 428 F.3d 1229, 1231-32 (9th Cir. 2005) (per curiam).

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1 On April 22, 2010, the Ninth Circuit issued its decision in Hayward v. Marshall, No. 06-
2 55392, 2010 WL 1664977 (9th Cir. Apr.22, 2010) (en banc). In Hayward, the Ninth Circuit held,
3 inter alia, that prisoners are required to obtain a certificate of appealability to review the denial of
4 a habeas petition challenging an administrative decision such as the denial of parole by the parole
5 board. Id. at *5. Pursuant to its decision in Hayward, on May 17, 2010, the Ninth Circuit
6 remanded this case to this Court for the limited purpose of granting or denying a certificate of
7 appealability.

8 A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a
9 district court's denial of his petition, and an appeal is only allowed in certain circumstances.
10 Miller-El v. Cockrell, 537 U.S. 322, 335- 36 (2003). The controlling statute in determining
11 whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

12 (a) In a habeas corpus proceeding or a proceeding under section
13 2255 before a district judge, the final order shall be subject to
14 review, on appeal, by the court of appeals for the circuit in which
15 the proceeding is held.

16 (b) There shall be no right of appeal from a final order in a
17 proceeding to test the validity of a warrant to remove to another
18 district or place for commitment or trial a person charged with a
19 criminal offense against the United States, or to test the validity of
20 such person's detention pending removal proceedings.

21 (c) (1) Unless a circuit justice or judge issues a certificate of
22 appealability, an appeal may not be taken to the court of appeals
23 from--

24 (A) the final order in a habeas corpus proceeding in which the
25 detention complained of arises out of process issued by a State
26 court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1)
only if the applicant has made a substantial showing of the denial
of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall
indicate which specific issue or issues satisfy the showing required
by paragraph (2).

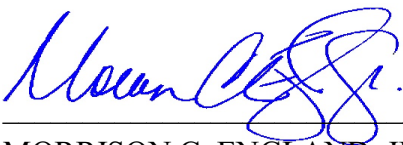
1 If a court denies a petitioner's petition, the court may only issue a certificate of
2 appealability "if jurists of reason could disagree with the district court's resolution of his
3 constitutional claims or that jurists could conclude the issues presented are adequate to deserve
4 encouragement to proceed further." Miller-El, 537 U.S. at 327; Slack v. McDaniel, 529 U.S.
5 473, 484 (2000). While the petitioner is not required to prove the merits of his case, he must
6 demonstrate "something more than the absence of frivolity or the existence of mere good faith on
7 his ... part." Miller-El, 537 U.S. at 338.

8 In the present case, the Court finds that reasonable jurists could find this Court's
9 determination that petitioner is not entitled to federal habeas corpus relief debatable.

10 Accordingly, a certificate of appealability is GRANTED on the issue of whether the state
11 court rejection of petitioner's claim that the Governor's reversal of the grant of parole was
12 contrary to, or involved an unreasonable application of, clearly established Federal law as
13 determined by the Supreme Court of the United States, or resulted in a decision that was based
14 on an unreasonable determination of the facts in light of the evidence presented.

15 IT IS SO ORDERED.

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17 Dated: May 26, 2010

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20 MORRISON C. ENGLAND, JR.
21 UNITED STATES DISTRICT JUDGE
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