

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

DANIEL J. SWANSON,

Petitioner,

No. CIV S-05-2206 MCE KJM F

VS.

TOM CAREY, Warden,

Respondent.

ORDER

On May 5, 2009, the magistrate judge recommended that petitioner's petition for a writ of habeas corpus, challenging a 2003 denial of parole, be denied. This court adopted the findings and recommendations on July 20, 2009. Thereafter petitioner filed a timely notice of appeal and requested the issuance of a certificate of appealability. This court neither granted nor denied the request under the authority of Rosas v. Nielsen, 428 F.3d 1229 (9th Cir. 2005), which held that such a certificate was not required for an appeal of a habeas denial which challenged parole or other administrative decisions. On December 16, 2009, the Court of Appeal issued an order confirming that no certificate of appealability was needed and directed the appeal to proceed.

25 According to the Court of Appeal's docket, petitioner filed his opening brief on
26 January 21, 2010. On February 1, 2010, respondent asked that the case be stayed pending the

1 issuance of the en banc decision in Hayward v. Marshall, 603 F.3d 546 (9th Cir. 2010) (en banc).
2 The Court of Appeal granted the motion and directed that the request be renewed; respondent
3 complied. After Hayward was issued, respondent moved to dismiss on the ground, among
4 others, that the Court of Appeal lacked jurisdiction over the appeal because this court had not
5 issued a certificate of appealability. Petitioner has now returned to this court, asking that a
6 certificate be issued.

7 A certificate of appealability may issue under 28 U.S.C. § 2253 “only if the
8 applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C.
9 § 2253(c)(2). The court must either issue a certificate of appealability indicating which issues
10 satisfy the required showing or must state the reasons why such a certificate should not issue.
11 Fed. R. App. P. 22(b).

12 For the reasons set forth in the magistrate judge’s May 5, 2009 findings and
13 recommendations, petitioner has not made a substantial showing of the denial of a constitutional
14 right. Accordingly, a certificate of appealability should not issue in this action.

15 IT IS SO ORDERED.

16 Dated: July 14, 2010

17 
18 MORRISON C. ENGLAND, JR.
19 UNITED STATES DISTRICT JUDGE
20
21
22
23
24
25
26