

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ROBERT ARTURO ORTIZ,

Petitioner,

vs.

W. J. SULLIVAN, Warden,

Respondent.

CASE NO. 07CV0494 WQH (PCL)

ORDER DENYING CERTIFICATE OF
APPEALABILITY

HAYES, Judge:

The matter pending before the Court is Petitioner's application for a certificate of appealability. (Doc. # 45).

BACKGROUND

On March 29, 2007, Petitioner filed the presently pending Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of California. (Doc. # 1). On August 14, 2008, Magistrate Judge Peter C. Lewis issued a Report and Recommendation recommending that the Court deny Petitioner's Petition and deny Petitioner's Motion for Stay and Abeyance. (Doc. # 34). On September 22, 2008, Petitioner filed objections to the Report and Recommendation. (Doc. # 38). On October 30, 2008, this Court adopted the Report and Recommendation, in its entirety, and denied Petitioner's Habeas Petition and Petitioner's motion for stay and abeyance. (Doc. # 43).

On December 3, 2008, Petitioner filed a Notice of Appeal (Doc. #44) and a Motion for

1 a Certificate of Appealability (Doc. #45) now before this Court.

2 **RULING OF THE COURT**

3 “The requirement that a petitioner seek a certificate of appealability is a gate-keeping
4 mechanism that protects the Court of Appeals from having to devote resources to frivolous
5 issues, while at the same time affording petitioners an opportunity to persuade the Court that,
6 through full briefing and argument, the potential merit of claims may appear.” *Lambright v.*
7 *Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000). A certificate of appealability may issue “only
8 if the applicant has made a substantial showing of the denial of a constitutional right.” 28
9 U.S.C. § 2253(c)(2). To this end, it must appear that reasonable jurists could find the district
10 court’s assessment of the petitioner’s constitutional claims “debatable or wrong.” *Slack v.*
11 *McDaniel*, 529 U.S. 473, 484-85 (2000). “Upon the filing of a notice of appeal and a request
12 for a certificate of appealability, the district court shall indicate which specific issue or issues
13 satisfy the standard for issuing a certificate, or state its reasons why a certificate should not be
14 granted.” *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997) (citing 28 U.S.C. §
15 2253(c)(3)).


16 Petitioner alleges that the court should grant his motion for a certificate of appealability
17 on the following claims: (1) that the trial court’s denial of his motion for disclosure of juror
18 information regarding potential juror misconduct violated his Sixth Amendment right to an
19 impartial jury, (2) that there was insufficient evidence to support the convictions for conspiracy
20 to commit kidnaping for robbery and kidnaping for robbery, (3) that the trial court erred in not
21 requiring the jury to unanimously agree on which act constituted movement for the purposes
22 of kidnaping, and (4) that the trial court imposed upper terms on counts five through eight, and
23 consecutive sentences on counts one, three and four in violation of the Sixth Amendment.
24 (Doc. # 45).

25 After reviewing the Petition, the Magistrate Judge’s Report and Recommendation,
26 Petitioner’s objection to the Magistrate Judge’s Report and Recommendation, this Court’s
27 Order adopting the Report and Recommendation and denying the Petition, and the notice of
28 appeal, the Court concludes that Petitioner has not made a substantial showing of the denial

1 of a constitutional right and that the state court decision denying Petitioner's habeas claim was
2 neither contrary to, nor an unreasonable application of clearly established U.S. Supreme Court
3 law. The Court concludes that reasonable jurists could not find that Petitioner was denied his
4 constitutional right to a trial by an impartial jury when the trial court refused to order the
5 disclosure of juror information. The trial court conducted an investigation and hearing
6 regarding the alleged juror misconduct and removed a potentially biased juror; Petitioner
7 failed to offer evidence of further juror bias or misconduct. The Court further concludes that
8 it is not debatable among reasonable jurists that there was a lack of evidence at trial to support
9 Petitioner's conviction for aggravated robbery, that Petitioner was entitled to a unanimity
10 instruction or unanimous jury verdict, or that consecutive sentences and upper terms could not
11 have been applied in sentencing Petitioner.

12 IT IS HEREBY ORDERED that Petitioner's motion for a certificate of appealability
13 (Docs. # 45) is DENIED in its entirety.

14 DATED: February 26, 2009

15 
16 **WILLIAM Q. HAYES**
United States District Judge

17
18
19
20
21
22
23
24
25
26
27
28