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## UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

RUFUS GRAY,

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Petitioner,

VS.

M. CATE, et al.,

Respondents.

CASE No. 09-CV-00709 BEN (KSC)

## ORDER DENYING CERTIFICATE OF APPEALABILITY

[ECF No. 70]

Presently before the Court is Petitioner Rufus Gray's request for a Certificate of Appealability ("COA"). ECF No. 70. On November 3, 2011, United States District Judge (then United States Magistrate Judge) Cathy Ann Bencivengo issued a thoughtful and well-reasoned Report and Recommendation recommending denial of Petitioner's Second Amended Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254. ECF. No. 47. On several occasions, the Court granted Gray additional time to file objections. Ultimately, however, Gray failed to timely object to Judge Bencivengo's findings and on September 21, 2012, the Court adopted the Report and denied the Petition. On October 26, 2012, Gray filed a notice of appeal and a request for a COA. ECF Nos. 69 & 70. The matter is pending in the Ninth Circuit.

The Court may issue a COA "only if the applicant has made a substantial

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showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by showing that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Gray does not have to show "that he should prevail on the merits. He has already failed in that endeavor." *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

Having reviewed the Second Amended Petition, the Court concludes that the issues are not debatable among jurists of reason and they do not deserve encouragement to proceed further. Accordingly, the Court declines to issue a COA. Gray's request is denied.

IT IS SO ORDERED.

DATED: June 2, 2013

HOM ROGER 1. BENITEL United States District Court Judg