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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>KEITH A. SOMERS,</p> <p style="text-align: center;">Petitioner - Appellant,</p> <p>v.</p> <p>TERESA A. SCHWARTZ,</p> <p style="text-align: center;">Respondent - Appellee.</p>

No. 08-15216

D.C. No. CV-04-00698-JKS/KJM

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
James K. Singleton, District Judge, Presiding

Submitted June 29, 2010**

Before: ALARCÓN, LEAVY, and GRABER, Circuit Judges.

California state prisoner Keith A. Somers appeals from the district court's judgment denying his 28 U.S.C. § 2254 habeas petition. We have jurisdiction under 28 U.S.C. § 2253, and we vacate and remand.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Somers contends that the Board of Prison Terms's 2002 (the "Board") decision to deny him parole was not supported by "some evidence" and therefore violated his due process rights. However, the record reflects that the district court confined its review of the state court decision affirming the Board's denial of parole to whether the decision was supported solely by the commitment offense. Because the district court did not have the benefit of this court's recent en banc opinion, *Hayward v. Marshall*, 603 F.3d 546, 562 (9th Cir. 2010), we vacate and remand for further proceedings consistent with that decision.

The parties should bear their own costs on appeal.

VACATED and REMANDED.