

MAR 16 2011

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GARY SMITH,

Petitioner - Appellant,

v.

A. P. KANE, Warden; JAMES DAVIS,
Chairman, Board of Parole Hearings,

Respondents - Appellees.

No. 08-15587

D.C. No. 06-CV-01830-CW

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Claudia A. Wilken, District Judge, Presiding

Submitted March 8, 2011**

Before: FARRIS, LEAVY, and BYBEE, Circuit Judges.

California state prisoner Gary Smith appeals pro se from the district court's judgment denying his 28 U.S.C. § 2254 habeas petition. We dismiss.

Smith contends that the Board of Prison Terms' 2003 decision to deny him

* 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).

parole for five years was not supported by “some evidence” and therefore violated his due process rights.

After briefing was completed in this case, this court held that a certificate of appealability is required to challenge the denial of parole. *See Hayward v. Marshall*, 603 F.3d 546, 554-55 (9th Cir. 2010) (en banc). Now the Supreme Court has held that the only federal right at issue in the parole context is procedural, and the only proper inquiry is what process the inmate received, not whether the state court decided the case correctly. *See Swarthout v. Cooke*, 131 S. Ct. 859 (2011) (per curiam). Because Smith raises no procedural challenges regarding his parole hearing, a certificate of appealability cannot issue. Further, because Smith has not made a substantial showing of the denial of a constitutional right, we decline to certify the remaining claims. *See* 28 U.S.C. § 2253(c).

DISMISSED.