

JUL 18 2011

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>JERRY EMERY DE LA CRUZ,</p> <p>Petitioner - Appellant,</p> <p>v.</p> <p>J. MARSHALL,</p> <p>Respondent - Appellee.</p>

No. 07-55909

D.C. No. CV-06-05716-GPS

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
George P. Schiavelli, District Judge, Presiding

Submitted July 12, 2011**

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

California state prisoner Jerry Emery De La Cruz appeals pro se from the district court’s judgment denying his 28 U.S.C. § 2254 habeas petition. We dismiss.

De La Cruz contends that the Board of Prison Terms’ 2004 decision to deny

* 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).

him parole was not supported by “some evidence” and therefore violated his due process rights. He also contends the Board failed to fix a maximum term of punishment, and that the district court abused its discretion by not providing an opportunity to file objections to the Magistrate Judge’s Final Report and Recommendation. After briefing was completed in this case, this court held that a certificate of appealability (“COA”) 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, 863 (2011) (per curiam). Because De La Cruz raises no procedural challenges regarding his parole hearing, a COA cannot issue, and we dismiss the appeal for lack of jurisdiction. *See* 28 U.S.C. § 2253(c)(2).

Further, because De La Cruz has not has made a substantial showing of the denial of a constitutional right, we decline to certify his remaining claims. *Id.*

DISMISSED.