

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 20 2009

ROBIN RONALD THORWARD,

Petitioner - Appellant,

v.

MIKE KNOWLES; EDMUND G.
BROWN, JR.,* Attorney General,

Respondents - Appellees.

No. 07-56396

D.C. No. CV-04-01953-IEG

MEMORANDUM**

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

Appeal from the United States District Court
for the Southern District of California
Irma E. Gonzalez, District Judge, Presiding

Submitted April 14, 2009***
Pasadena, California

BEFORE: CANBY, RAWLINSON and N.R. SMITH, Circuit Judges

Robin Thorward filed an abandonment of appeal of his state convictions pursuant to California Rule of Court 38, resulting in a dismissal of the appeal and

* Edmund G. Brown, Jr. is substituted for his predecessor William Lockyer, Attorney General, pursuant to Fed. R. App. P. 43(c)(2).

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

*** The panel unanimously finds this case suitable for decision without oral argument pursuant to Fed. R. App. P. 34(a)(2).

issuance of remittitur. Thorward filed a habeas corpus petition in state court, and after failing there, another one in federal court, challenging the effective assistance of his appellate counsel in the decision to abandon his appeal. After an evidentiary hearing, the district court found that Thorward asked his counsel to abandon his appeal, and did not countermand that order until after she had filed the abandonment form. The court therefore held that Thorward's Sixth Amendment rights were not violated. We affirm.

The two issues that Thorward raises on appeal, inadequate consultation by appellate counsel and failure to recall the remittitur, were not exhausted in state court as AEDPA requires. *See Gray v. Netherland*, 518 U.S. 152, 161-62 (1996) (28 U.S.C. § 2254(b) requires that petitioners present to the state court both the facts necessary to state a claim for relief and the federal legal theory on which that claim is based). He also has not shown that either of these claims would be procedurally barred by California law. *See id.* (requisite exhaustion is satisfied regardless of petitioner's failure to present the claim to state court if the claim is procedurally barred under state law). Accordingly, we do not review these claims.

The only issue that is appealable here—the district court's determination that appellate counsel followed Thorward's instruction to abandon his appeal—is not challenged by Thorward.

Accordingly, we **AFFIRM** the denial of the petition for a writ of habeas corpus.