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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>DAVID RUCKER,</p> <p>Petitioner - Appellant,</p> <p>v.</p> <p>JIM HAMLET,</p> <p>Respondent - Appellee.</p>
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No. 07-16748

D.C. No. CV-03-01715-LKK

MEMORANDUM*

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

Submitted February 16, 2010**

Before: FERNANDEZ, GOULD, and M. SMITH, Circuit Judges.

California state prisoner David Rucker appeals from the district court’s denial of his 28 U.S.C. § 2254 habeas petition challenging his “Three-Strikes”

* 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).

conviction and sentence for driving under the influence. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.

Rucker contends that his sentence of twenty-five years to life constitutes cruel and unusual punishment under the Eighth Amendment. Given the circumstances of the offense and of Rucker's prior convictions, the state court did not unreasonably apply clearly established federal law. *See* 28 U.S.C. § 2254(d)(1); *Lockyer v. Andrade*, 538 U.S. 63, 72-73 (2003); *see also Rios v. Garcia*, 390 F.3d 1082, 1086 (9th Cir. 2004) (upholding "Three Strikes" sentence of twenty-five years to life for felony petty theft where petitioner struggled with loss prevention officer and prior robbery strikes involved threat of violence).

Rucker also contends that appellate counsel was ineffective for refusing to raise the Eighth Amendment issue on direct appeal. The record reflects that counsel's performance was not deficient, and that Rucker cannot demonstrate prejudice because the claim lacked merit. *See Jones v. Smith*, 231 F.3d 1227, 1239 n.8 (9th Cir. 2000); *Wildman v. Johnson*, 261 F.3d 832, 840 (9th Cir. 2001).

Rucker last contends that the state trial court violated his due process rights when it gave CALJIC 17.41.1, the jury nullification instruction. As Rucker concedes, however, this claim is foreclosed by *Brewer v. Hall*, 378 F.3d 952, 957 (9th Cir. 2004) (affirming district court's denial because there is no clearly

established federal law holding that CALJIC 17.41.1 violates an existing constitutional right).

AFFIRMED.