

JAN 25 2011

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>MICHAEL UPTON KERSHAW,</p> <p>Petitioner - Appellant,</p> <p>v.</p> <p>MIKE EVANS, Warden,</p> <p>Respondent - Appellee.</p>

No. 09-17384

D.C. No. 2:06-cv-01430-MMS

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Mary M. Schroeder, Circuit Judge, Presiding

Submitted January 10, 2011**

Before: BEEZER, TALLMAN, and CALLAHAN, Circuit Judges.

California state prisoner Michael Upton Kershaw appeals pro se 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 affirm.

* 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).

Kershaw contends that his counsel was ineffective for failing to accurately advise him regarding his potential sentence if he rejected the state's plea offer and proceeded to trial.

The state court, after conducting an evidentiary hearing, found that Kershaw failed to show either deficient performance or prejudice regarding this claim. This decision was not contrary to or an unreasonable application of *Strickland v. Washington*, 466 U.S. 668, 690-93 (1984). *See* 28 U.S.C. § 2254(d)(1).

The state court also found that Kershaw was aware of his potential sentencing exposure under California Penal Code § 667.71. Kershaw failed to present "clear and convincing evidence" overcoming the presumption of correctness of this finding. Accordingly, the state court's decision was not based on an "unreasonable determination of the facts in light of the evidence presented in the state court proceeding." *See* 28 U.S.C. § 2254(d)(2),(e)(1).

AFFIRMED.