

APR 11 2011

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RONALD P. FOSTER,

Petitioner - Appellant,

v.

M. EVANS, Warden,

Respondent - Appellee.

No. 09-16659

D.C. No. 5:08-cv-04269-RMW

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Submitted April 5, 2011**

Before: B. FLETCHER, CLIFTON, and BEA, Circuit Judges.

California state prisoner Ronald P. Foster appeals pro se from the district court's judgment dismissing his 28 U.S.C. § 2254 habeas petition. We have

* 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).

jurisdiction under 28 U.S.C. § 2253,*** and we affirm.

Foster contends that the district court erred in dismissing his petition as procedurally defaulted. Specifically, he argues that the state court's determination that his petition was successive does not constitute an adequate and independent state bar. This contention fails. Foster did not meet his burden of "asserting specific factual allegations that demonstrate the inadequacy of the state procedure." *See Bennett v. Mueller*, 322 F.3d 573, 585-86 (9th Cir. 2003).

Foster further contends that the California Court of Appeal's decision was the last reasoned state court decision and that it constitutes an adjudication on the merits. However, the record reflects that the California Superior Court's judgment citing *In re Clark*, 5 Cal.4th 750, 767 (1993), was the last reasoned decision and that the California Court of Appeal's decision was not an adjudication on the merits. *See Ylst v. Nonnemaker*, 501 U.S. 797, 804 (1991); *see also Lambert v. Blodgett*, 393 F.3d 943, 966-67, 969 (9th Cir. 2004) (for purpose of § 2254, a dismissal on procedural grounds is not an adjudication on the merits).

AFFIRMED.

*** We certify for appeal, on our own motion, the issue of whether the district court erred in dismissing Foster's petition as procedurally defaulted. *See* 9th Cir. R. 22-1(e); *see also Hiivala v. Wood*, 195 F.3d 1098, 1104-05 (9th Cir. 1999) (per curiam).