

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 23 2012

MICHAEL A. RIVERA,

Petitioner - Appellant,

v.

STATE OF ARIZONA ATTORNEY
GENERAL and CHARLES L. RYAN,

Respondents - Appellees.

No. 09-16119

D.C. No. 2:08-cv-00317-FJM-JCG

MEMORANDUM*

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

Appeal from the United States District Court
for the District of Arizona
Frederick J. Martone, District Judge, Presiding

Argued and Submitted February 16, 2012
San Francisco, California

Before: GRABER, BERZON, and TALLMAN, Circuit Judges.

Petitioner Michael A. Rivera appeals the denial of his habeas corpus petition, filed pursuant to 28 U.S.C. § 2254. In denying Petitioner's petition, the district judge accepted and adopted a magistrate judge's report that recommended denying the petition as untimely. That report also contained an alternative ruling

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

that, even if the petition were timely, Petitioner would not be entitled to relief, because all of his claims were either procedurally barred, not exhausted, or substantively not cognizable on federal habeas. On appeal, Petitioner challenges only the untimeliness portion of the district court's decision.

Having failed to raise, in his opening brief, a challenge to any part of the alternative holding, Petitioner has now waived the opportunity to do so. See Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999) ("[A]rguments not raised by a party in its opening brief are deemed waived."). Even though the certificate of appealability did not encompass any issue relating to the merits holding, our rules permit briefing of uncertified issues. See 9th Cir. R. 22-1(e) ("[I]f a petitioner concludes during the course of preparing the opening brief, that an uncertified issue should be discussed in the brief, the petitioner shall first brief all certified issues under the heading, 'Certified Issues,' and then, in the same brief, shall discuss any uncertified issues under the heading, 'Uncertified Issues.'"). Because the unchallenged alternative holding is independently sufficient to decide the case, we need not and do not decide the timeliness-related issues.

AFFIRMED.