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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>ANDRÉ RHODES,</p> <p>Petitioner - Appellant,</p> <p>v.</p> <p>MIKE McDONALD, Warden,</p> <p>Respondent - Appellee.</p>

No. 11-16573

D.C. No. 2:10-cv-01444-GGH

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Gregory G. Hollows, Magistrate Judge, Presiding**

Submitted June 18, 2013***

Before: TALLMAN, M. SMITH, and HURWITZ, Circuit Judges.

Former California state prisoner André Rhodes appeals pro se from the district court’s judgment dismissing his 28 U.S.C. § 2254 petition for failure to exhaust. 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 parties consented to proceed before a magistrate judge.

*** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Rhodes contends that he submitted documentation to the district court establishing exhaustion of his state remedies. We review de novo the dismissal of a 28 U.S.C. § 2254 habeas petition for failure to exhaust. *See Rhoades v. Henry*, 638 F.3d 1027, 1034 (9th Cir. 2011).

The district court correctly determined that Claims 2a, 3, and 4 have never been presented to the California Supreme Court and are, accordingly, unexhausted. *See* 28 U.S.C. § 2254(b)(1)(A); *Peterson v. Lampert*, 319 F.3d 1153, 1155-56 (9th Cir. 2003) (en banc). Claims 1 and 2b were raised in a pro se petition to the California Supreme Court, which denied the petition with a citation to *In re Swain*, 34 Cal. 2d. 300, 304 (1949). Our independent review of the record makes clear that these claims were not alleged with sufficient particularity to satisfy the requirement of fair presentation to the state's high court. *See Kim v. Villalobos*, 799 F.2d 1317, 1319-20 (9th Cir. 1986). Accordingly, the district court properly dismissed the petition as unexhausted.

We construe Rhodes's additional arguments as a motion to expand the certificate of appealability. So construed, the motion is denied. *See* 9th Cir. R. 22-1(e); *Hiivala v. Wood*, 195 F.3d 1098, 1104-05 (9th Cir. 1999) (per curiam). All other pending motions are denied.

AFFIRMED.