

AUG 04 2014

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAMONE L. HICKS,

Petitioner - Appellant,

v.

RANDY GROUNDS, Warden,

Respondent - Appellee.

Nos. 12-55379

13-56906

D.C. Nos. 2:11-cv-07369-DDP

2:12-cv-03451-DDP

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dean D. Pregerson, District Judge, Presiding

Submitted July 22, 2014**

Before: GOODWIN, CANBY, and CALLAHAN, Circuit Judges.

In these related appeals, Damone L. Hicks appeals from the district court's judgments denying his 28 U.S.C. § 2254 habeas corpus petitions.

In Appeal No. 12-55379, we granted a certificate of appealability as to "(1) whether the district court erred in concluding that appellant's challenge to the

* 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).

sufficiency of evidence supporting Count Five was not properly exhausted on the grounds that he failed to explicitly raise the federal aspect of his claim, [. . .] and (2) whether the district court erred in dismissing appellant’s Second Amended Habeas petition pursuant to *Sherwood v. Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983).” We agree with the parties that the district court erred in dismissing Hicks’s petition. However, the remedy this court would provide is to remand for consideration of the claims on the merits, and during the pendency of this appeal, the district court already considered those claims on the merits in case number 2:12-cv-03451 and denied relief. Hicks’s request for a certificate of appealability in that case is pending before this court in Appeal No. 13-56906. Accordingly, we dismiss the appeal as moot.

In Appeal No. 13-56906, Hicks appeals from the denial of his section 2254 habeas petition on the merits in district court case number 2:12-cv-03451. Hicks’s motions for judicial notice and to file documents under seal are granted. Having considered the merits of Hicks’s claim, we deny the request for a certificate of appealability. *See* 28 U.S.C. § 2253(c)(2). All other motions are denied as moot.

Appeal No. 12-55379: DISMISSED.

Appeal No. 13-56906: DENIED.