

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

AUG 21 2018

FOR THE NINTH CIRCUIT

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

DERRAN SMILEY,

No. 16-17002

Petitioner-Appellant,

D.C. No. 5:15-cv-05507-RMW

v.

MEMORANDUM*

WILLIAM MUNIZ, Warden,

Respondent-Appellee.

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

Submitted August 15, 2018**

Before: FARRIS, BYBEE, and N.R. SMITH, Circuit Judges.

California state prisoner Derran Smiley appeals pro se from the district court's judgment dismissing his 28 U.S.C. § 2254 habeas corpus petition. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

Contrary to Smiley's argument, the sole issue certified for appeal by the

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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

district court is whether Smiley's habeas petition is second or successive. *See Hiivala v. Wood*, 195 F.3d 1098, 1103 (9th Cir. 1999) (a certificate of appealability ("COA") is granted "on an issue-by-issue basis, thereby limiting appellate review to those issues alone").

Smiley argues that his petition is not second or successive because the state court's amendments to the abstract of judgment in 2015 resulted in a new, intervening judgment under *Magwood v. Patterson*, 561 U.S. 320 (2010). The record shows the state court ordered the abstract of judgment corrected to reflect that the jury had found true kidnapping special allegations, and to include the penal code provision governing part of Smiley's sentence. These amendments corrected scrivener's errors, which arose from discrepancies between the oral pronouncement of sentence and the abstract of judgment; as such, they did not give rise to a new judgment. *See Gonzalez v. Sherman*, 873 F.3d 763, 772 (9th Cir. 2017) ("Correcting a scrivener's error in the abstract of judgment does not lead to a new judgment because the judgment itself does not change, only the written record that erroneously reflects that judgment.").

Smiley also contends that his petition is not second or successive because it raised claims that were not alleged in his first petition. A petition, however, is second or successive "if it raises claims that were or could have been adjudicated on their merits in an earlier petition." *Woods v. Carey*, 525 F.3d 886, 888 (9th Cir.

2008) (internal quotations omitted).

We treat Smiley's briefing of uncertified issues as a motion to expand the COA, and deny the motion along with his separately filed motions to expand the COA. *See* 9th Cir. R. 22-1(e); *Hiivala*, 195 F.3d at 1104-05.

AFFIRMED.