

OCT 27 2010

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| <p>DEREK SYLVESTER,</p> <p>Petitioner - Appellant,</p> <p>v.</p> <p>SCOTT P. RAWERS, Warden, Avenal State Prison; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,</p> <p>Respondents - Appellees.</p> |
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No. 08-15781

D.C. No. 2:03-CV-01301-GEB

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Garland E. Burrell, Jr., District Judge, Presiding

Submitted October 19, 2010**

Before: O'SCANNLAIN, TALLMAN, and BEA, Circuit Judges.

California state prisoner Derek Sylvester appeals from the district court's judgment denying his 28 U.S.C. § 2254 petition. 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 panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Sylvester contends the district court abused its discretion in declining to hold an evidentiary hearing on his claim. After de novo review, we conclude that the district court did not abuse its discretion because the record reveals Sylvester was not diligent in developing the evidence in his state court proceedings. *See* 28 U.S.C. § 2254(e)(2); *Baja v. Ducharme*, 187 F.3d 1075, 1079 (9th Cir. 1999).

Sylvester argues that the State has breached his plea agreement by capping his custody credit eligibility at 15%. The state court's rejection of this claim was neither contrary to, nor an unreasonable application of, *Santobello v. New York*, 404 U.S. 257, 261-62 (1971), nor based on an unreasonable determination of the facts based on the evidence presented. *See* 28 U.S.C. § 2254(d).

AFFIRMED.