

JAN 28 2015

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>CARLOS FOSTER,</p> <p>Petitioner - Appellant,</p> <p>v.</p> <p>TIM V. VIRGA, Warden,</p> <p>Respondent - Appellee.</p>

No. 14-15687

D.C. No. 2:13-cv-02138-KJM

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Kimberly J. Mueller, District Judge, Presiding

Submitted January 21, 2015**

Before: CANBY, GOULD, and N.R. SMITH, Circuit Judges.

Carlos Foster appeals pro se from the district court’s judgment dismissing his 28 U.S.C. § 2254 habeas 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).

The district court dismissed Foster's habeas petition on the basis that it was an unauthorized second or successive petition. The court granted a certificate of appealability on the issue of whether Foster needed permission to file the second petition given that the first petition was denied as untimely. *See, e.g., Cook v. Ryan*, 688 F.3d 598, 608 (9th Cir. 2012). Foster has not addressed this issue on appeal and has thereby waived any challenge to the district court's dismissal. *See Womack v. Del Papa*, 497 F.3d 998, 1004 (9th Cir. 2007).

We treat Foster's allegations regarding ineffective assistance of counsel, newly discovered DNA evidence, and cumulative error, as a motion to expand the certificate of appealability, and we deny the motion. *See* 9th Cir. R. 22-1(e); *Hiivala v. Wood*, 195 F.3d 1098, 1104-05 (9th Cir. 1999) (per curiam).

Foster's motion to dismiss the answering brief is denied.

AFFIRMED.