

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 23 2008

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

LUIS FELIPE CASAS-CASTRILLON,

Petitioner - Appellant,

v.

BARBARA WAGNER, Warden, Warden;
et al.,

Respondents - Appellees.

No. 05-56158

D.C. No. CV-05-00755-MLH

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Marilyn L. Huff, District Judge, Presiding

Submitted January 8, 2008**
Pasadena, California

Before: FARRIS, FISHER, and M. SMITH, Circuit Judges.

Luis Felipe Casas-Castrillon appeals the denial of his petition for writ of habeas corpus. Casas-Castrillon argues that the district court 1) failed to construe his habeas petition as a petition for writ of error *coram nobis*, and 2) improperly

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

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

found he did not meet the *Gideon v. Wainwright* exception to the custody requirement of 28 U.S.C. § 2254(a).¹ We affirm.

We review de novo a district court’s denial of a petition for habeas corpus, 28 U.S.C. § 2254, or for writ of error *coram nobis*. See *Benitez v. Garcia*, 495 F.3d 640, 643 (9th Cir. 2007) (habeas); *United States v. Kwan*, 407 F.3d 1005, 1011 (9th Cir. 2005) (*coram nobis*). We may affirm on any ground supported by the record even if it differs from the rationale of the district court. See *Buckley v. Terhune*, 441 F.3d 688, 694 (9th Cir. 2006).

Casas-Castrillon contends that the district court erred by not construing, sua sponte, his § 2254 petition as a petition for writ of error *coram nobis*. As Casas-Castrillon acknowledges, he raises this issue for the first time on appeal. This alone bars his claim. *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992) (“As a general rule, an appellate court will not hear an issue raised for the first time on appeal.”); see *Resendiz v. Kovensky*, 416 F.3d 952, 960-61 (9th Cir. 2005). The district court was not obligated to construe, sua sponte, his petition as a writ of error *coram nobis*. *Resendiz*, 416 F.3d at 960-61.

Casas-Castrillon argues that the *Gideon* exception to 28 U.S.C. § 2254(a)’s custody requirement applies where his attorney was absent at the time he entered

¹372 U.S. 335 (1963).

his guilty plea, and where his plea was unintelligent and involuntary. A complete failure of counsel, a *Gideon* violation, may be an exception to the custody requirement of § 2254(a). *Custis v. United States*, 511 U.S. 485, 494-96 (1994). The record shows that Casas-Castrillon's attorney was present in court when he entered his plea. Moreover, his counsel's advice to plead guilty was neither defective nor in violation of *Gideon*. See *United States v. Hernandez*, 203 F.3d 614, 619 n.7 (9th Cir. 2000).

AFFIRMED.