

SEP 28 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>DALE STEPHEN RODABAUGH,</p> <p>Petitioner - Appellant,</p> <p>v.</p> <p>P.L. VASQUEZ,</p> <p>Respondent - Appellee.</p>
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No. 07-55673

D.C. No. CV-02-09754-MMM

MEMORANDUM\*

Appeal from the United States District Court  
for the Central District of California  
Margaret M. Morrow, District Judge, Presiding

Submitted June 16, 2009\*\*

Before: PAEZ, TALLMAN, and N.R. SMITH, Circuit Judges.

California state prisoner Dale Stephen Rodabaugh appeals from the district court's judgment denying his 28 U.S.C. § 2254 habeas petition. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.

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

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

Rodabaugh contends that the trial court violated his due process rights by admitting identification evidence that he claims was obtained through impermissibly suggestive pretrial identification procedures. The state court's decision rejecting this claim was not contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor was it based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *See* 28 U.S.C. § 2254(d); *see also Neil v. Biggers*, 409 U.S. 188, 196-200 (1972); *Simmons v. United States*, 390 U.S. 377, 384-86 (1968).

Rodabaugh also contends that trial counsel was ineffective by failing to pursue a ruling on a motion to suppress the identification evidence, and by failing to file a second suppression motion. The state court's decision rejecting this claim was not contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor was it based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *See* 28 U.S.C. § 2254(d); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986).

To the extent that Rodabaugh raises uncertified claims, we construe such

argument as a motion to expand the certificate of appealability, and we deny the motion. *See* 9th Cir. R. 22-1(e); *see also Hiivala v. Wood*, 195 F.3d 1098, 1104-05 (9th Cir. 1999) (per curiam).

**AFFIRMED.**