

MAR 02 2009

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>DONALD D. GIBERSON,</p> <p>Petitioner - Appellant,</p> <p>v.</p> <p>DORA B. SCHRIRO; et al.,</p> <p>Respondents - Appellees.</p>

No. 07-16550

D.C. No. CV-01-02459-SRB

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Susan R. Bolton, District Judge, Presiding

Submitted February 18, 2009**

Before: BEEZER, FERNANDEZ, and W. FLETCHER, Circuit Judges.

Arizona state prisoner Donald D. Giberson appeals from the district court's judgment dismissing his 28 U.S.C. § 2254 habeas petition and the district court's order denying his motion to vacate the judgment. We have jurisdiction pursuant to

* 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).

28 U.S.C. § 2253, and we affirm.

Giberson contends that his trial counsel was ineffective for failing to object to unsolicited testimony from a witness that she had taken a polygraph exam, and to the prosecutor's vouching for her testimony during closing argument. Giberson has not demonstrated that his counsel's performance was deficient. *See Strickland v. Washington*, 466 U.S. 668, 693-94 (1984). We conclude that the state court's decision rejecting Giberson's ineffective assistance of counsel claim was neither contrary to, nor an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d)(1).

Giberson also contends that the prosecution improperly vouched for the testimony of a co-conspirator when it referenced on direct examination an addendum to the co-conspirator's plea agreement requiring the co-conspirator to testify truthfully. Giberson contends that this violated his constitutional rights to due process, confrontation, and a fair trial. We conclude that the state court's decision rejecting this claim was neither contrary to, nor an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d)(1); *see also Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004) .

We construe the uncertified issue raised by Giberson 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 (9th Cir. 1999) (per curiam).

AFFIRMED.