

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

FEB 06 2009

THOMAS STINKO MARKS, a/k/a
Thomas Stanco Marks,

Petitioner - Appellant,

v.

ROB MCKENNA, Washington State
Attorney General; et al.,

Respondents - Appellees.

No. 07-35998

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

D.C. No. CV-07-00024-WFN

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Wm. Fremming Nielsen, Senior District Judge, Presiding

Submitted January 23, 2009**
Seattle, Washington

Before: BEEZER, TALLMAN and M. SMITH, Circuit Judges.

Petitioner-Appellant Thomas Marks appeals the denial of his petition for a writ of habeas corpus. As the facts and procedural history are familiar to the parties, we do not recite them here except as necessary to explain our disposition.

* 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).

Petitions for habeas corpus relief such as this one are governed by the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(d). *Lindh v. Murphy*, 521 U.S. 320, 322 (1997). Under AEDPA, we may not grant habeas relief unless the last reasoned state court adjudication, here that of the Washington Court of Appeals, “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” or “(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d). We review a district court’s denial of a habeas petition de novo. *Campbell v. Rice*, 408 F.3d 1166, 1169 (9th Cir. 2005) (en banc).

Petitioner claims that his attorney’s joint representation during a pre-trial hearing created an actual conflict of interest, thereby denying him his Sixth Amendment right to counsel. The state court in this case determined that no actual conflict of interest existed.¹ Therefore, Petitioner must show that the state court’s decision was “contrary to, or involved an unreasonable application of, clearly

¹ The state court found no actual conflict because (1) “[d]efense counsel did not actively represent Steve Marks’s interests”; (2) there was no “evidence that Mr. Marks’s and Steve Marks’s interests were adverse”; and (3) “the testimony of both defendants at trial was consistent.”

established Federal law” or was “based on an unreasonable determination of the facts in light of the evidence presented.” 28 U.S.C. § 2254(d). To make that showing, Petitioner must first show that his trial counsel labored under an actual conflict, that is, he “actively represented conflicting interests,” *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980), and that the conflict “actually affected the adequacy of his representation.” *Id.* at 349.

We assume, *arguendo*, that Petitioner satisfies the first prong, that during the pre-trial conference, Petitioner’s trial counsel “actively represented conflicting interests,” however minimal that conflict was. *See id.* at 350. The second prong poses the more difficult question: whether the conflicting interests affected the representation of Petitioner’s counsel. To answer this question, we ask whether his counsel—had he not been representing Steve Marks at the time of Petitioner’s pre-trial conference—would have employed a “plausible alternative defense strategy or tactic,” *Hovey v. Ayers*, 458 F.3d 892, 908 (9th Cir. 2006), that “possessed sufficient substance to be a viable alternative.” *United States v. Rodriques*, 347 F.3d 818, 823 (9th Cir. 2003). Petitioner argues that such a “plausible alternative defense strategy or tactic” exists, namely, that counsel would have attempted to impeach co-defendant Steve Marks on his testimony that he heard Petitioner say the word “[motherf***er].”

The only conceivable reason for counsel to have impeached Steve Marks under this circumstance would have been to put that testimony in the record for further impeachment at trial. *See* Wash. R. Evid. 607, 613 (discussing impeaching witnesses with prior inconsistent statements); *State v. Huynh*, 26 P.3d 290, 293 (Wash. Ct. App. 2001). However, such an attempted impeachment would have served little purpose; it would not have “possessed sufficient substance to be a viable alternative.” *Rodrigues*, 347 F.3d at 823.

First, Petitioner himself gave contradictory testimony on the statement in question. He first agreed that he had said “come on, [motherf***er],” but then on cross-examination, denied that he had said [motherf***er] at all. Steve Marks first testified that he heard Petitioner say “come on, [motherf***er].” But on cross-examination, Steve Marks insisted that he never said he heard Petitioner say “come on,” but that he still might have heard him say “[motherf***er].” Therefore, because Petitioner himself had already agreed earlier in his testimony that he *had* said “[motherf***er],” a witness’ testimony to the contrary would have done little to mitigate this admission.

Moreover, even if Petitioner’s counsel had attempted to adduce testimony from Steve Marks at trial that Petitioner never said “[motherf***er],” the prosecution certainly would have impeached Steve Marks with his own earlier

testimony that Petitioner *had* said “[motherf***er].” *See* Wash. R. Evid. 613.

Therefore, an attempted impeachment of Steve Marks at that stage also would have been largely ineffective, and even a fully competent, non-conflicted attorney would not have pursued that tactic.

Thus, Petitioner has not shown any “plausible alternative defense strategy or tactic [that] might have been pursued but was not” because of Petitioner’s counsel’s conflict. *See Hovey*, 458 F.3d at 908. As a result, Petitioner cannot show that any conflict “actually affected the adequacy of his [counsel’s] representation,” *Cuyler*, 446 U.S. at 349, so Petitioner cannot show an actual conflict of interest.²

Although the state court’s rationale for finding no actual conflict was different from that articulated above, its conclusion was the same. The state court thus did not arrive at a decision that was “contrary to, or involved an unreasonable application of, clearly established Federal law” or “based on an unreasonable determination of the facts in light of the evidence presented.” *See* 28 U.S.C. § 2254(d).

DENIED.

² In reaching this conclusion, we have not considered whether Petitioner was prejudiced, a prohibited inquiry under *Cuyler*. *See* 446 U.S. at 349–50.