

MAR 24 2009

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

NOT FOR PUBLICATION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

ANTHONY P. JOHNSON,

Petitioner - Appellant,

v.

TIMOTHY WENGLER, Acting Warden,

Respondent - Appellee.

No. 07-36077

D.C. No. CV-07-00195-JCC

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Submitted March 18, 2009**

Before: LEAVY, HAWKINS, and TASHIMA, Circuit Judges.

Anthony P. Johnson, a Washington state prisoner, appeals pro se from the district court's judgment denying his 28 U.S.C. § 2254 petition. We have jurisdiction pursuant to 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 finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Johnson contends that his conviction for murder in the second degree, based on alternate means of committing the offense, violates his due process and jury trial rights under the Fifth and Sixth Amendments of the United States Constitution because the jury findings are inconsistent with respect to his intent. Even if we assume, without deciding, that Supreme Court law clearly establishes a constitutional protection against a single conviction based on inconsistent alternate means of committing the offense, we conclude that there was no inconsistency. *See Ferrizz v. Giurbino*, 432 F.3d 990, 993-95 (9th Cir. 2005). We thus conclude that the state court's decision denying relief on these grounds was neither contrary to, nor an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. *See id.*

We construe Johnson's briefing of uncertified issues 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).

AFFIRMED.