

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

JUN 09 2009

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

PETER JOHN RODRIGUEZ,

Petitioner - Appellant,

v.

M. EVANS,

Respondent - Appellee.

No. 06-56564

D.C. No. CV-05-01741-RGK

MEMORANDUM \*

Appeal from the United States District Court  
for the Central District of California  
R. Gary Klausner, District Judge, Presiding

Submitted June 5, 2009\*\*  
Pasadena, California

Before: W. FLETCHER, CLIFTON and M. SMITH, Circuit Judges.

Peter John Rodriguez appeals the denial of his habeas corpus petition. His appeal raises two claims of ineffective assistance of counsel. 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).

Rodriguez's claims were adjudicated on the merits by the state court. As a result, he is entitled to habeas relief only if he can show that the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d).

Rodriguez first argues that the state court unreasonably concluded that his counsel was not ineffective in failing to move to suppress an eyewitness's identifications because there were no exigent circumstances warranting a show-up and because the witness's identifications were unreliable. "[A] show-up," however, "is a permissible means of identification without requiring a showing of exigency." *United States v. Booth*, 669 F.2d 1231, 1239 (9th Cir. 1981). Moreover, Rodriguez has not rebutted the state court's observations that (1) the witness's description was highly accurate, (2) she was certain of her identifications, and (3) the initial identification occurred shortly after the murder took place. Because the identifications were reliable based on these factual findings, *see Neil v. Biggers*, 409 U.S. 188, 196-201 (1972) (totality of the circumstances), the state court's analysis was not "objectively unreasonable." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003).

Rodriguez also asserts that he was given ineffective assistance by his counsel's failure to interview and call Robert Smith as a witness. Rodriguez's attorney needed "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691 (1984). But the state court correctly concluded that even if Rodriguez's counsel was ineffective by not making such investigations or decision, Rodriguez was not prejudiced as a result.

Smith's affidavit only states that he never saw a gun in Rodriguez's car, never saw the police remove a gun from the car, and never said there was a gun in the car. This possible testimony would have done little to help Rodriguez. For example, Smith's counterpart affirmatively said that he saw a gun in Rodriguez's car and two eyewitnesses saw a man fitting Rodriguez's description running away from the crime scene with a gun in his hand. Since Smith's testimony could not have rebutted these affirmative declarations, let alone challenged the physical evidence against Rodriguez, Rodriguez has not shown that there is a "reasonable probability" that "the result of the proceeding would have been different" had Smith testified. *Id.* at 694. Accordingly, the state court's decision was not an unreasonable application of federal law. *See Edwards v. Lamarque*, 475 F.3d 1121, 1125-26 (9th Cir. 2007) (en banc) ("The unreasonable application clause

requires . . . . evidence . . . too powerful to conclude anything but the contrary . . .  
.”) (internal citations omitted).

**AFFIRMED.**