

MAR 17 2010

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

NOT FOR PUBLICATION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

STEPHEN C. DEAN,

Petitioner - Appellant,

v.

DORA SCHRIRO; et al.,

Respondents - Appellees.

No. 08-16094

D.C. No. 2:07-cv-01437-SRB

MEMORANDUM*

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

Submitted February 10, 2010**
San Francisco, California

Before: O’SCANNLAIN, TROTT and PAEZ, Circuit Judges.

Stephen Dean appeals the district court’s denial of his 28 U.S.C. § 2254 petition for habeas corpus relief. We have jurisdiction under 28 U.S.C. § 2253.

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

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

We review de novo the district court's denial of the petition, *Gonzalez v. Brown*, 585 F.3d 1202, 1206 (9th Cir. 2009), and we affirm.

We decline to decide whether a failure to exhaust or a procedural bar precludes Dean from obtaining federal habeas relief on his prosecutorial vindictiveness claim and instead deny his petition on the merits. *See* 28 U.S.C. § 2254(b)(2); *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997); *Holley v. Yarborough*, 568 F.3d 1091, 1098 (9th Cir. 2009). Dean has presented no “direct evidence of actual vindictiveness or facts that warrant an appearance of such,” nor has he offered any evidence “indicating a realistic or reasonable likelihood of vindictiveness.” *Nunes v. Ramirez-Palmer*, 485 F.3d 432, 441–42 (9th Cir. 2007) (internal quotation marks and citation omitted). Indeed, the record shows that the prosecutor made the plea offer's expiration date clear over a week before Dean requested new counsel. This dispels any inference that the prosecution impermissibly declined to extend the plea deal in order to punish Dean for exercising his constitutional right to conflict-free counsel. Because Dean's claim clearly fails on the merits, we affirm the district court's denial of his petition for habeas relief.

AFFIRMED.