

APR 21 2010

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SIDNEY HUBBARD,

Petitioner - Appellant,

v.

TOM L. CAREY,

Respondent - Appellee.

No. 07-16570

D.C. No. CV-02-00023-ALA

MEMORANDUM\*

Appeal from the United States District Court  
for the Eastern District of California  
Arthur L. Alarcón, Circuit Judge, Presiding

Submitted April 5, 2010\*\*

Before: RYMER, McKEOWN, and PAEZ, Circuit Judges.

California state prisoner Sidney Hubbard appeals from the district court's judgment denying his 28 U.S.C. § 2254 habeas petition. We have jurisdiction pursuant to 28 U.S.C. § 2253, and 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 concludes this case is suitable for decision without oral argument. *See* Fed. R. App.

Hubbard contends that he received ineffective assistance of counsel at trial because his counsel failed to investigate potentially exculpatory evidence concerning the alleged reputation of the robbery victim. However, Hubbard failed to demonstrate that such evidence could have been discovered by counsel with reasonable diligence. Thus, the California court's rejection of this claim were neither contrary to, nor an unreasonable application of, clearly established Supreme Court law. *See* 28 U.S.C. § 2254(d)(1); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Hubbard also contends that he received ineffective assistance of counsel because counsel did not object to the admission, at trial, of a videotaped store surveillance footage that lacked audio. Hubbard maintains that the missing audio component would have provided exculpatory evidence. However, Hubbard has failed to show that the missing audio portion was exculpatory. Thus the California court's rejection of this claim was neither contrary to, nor an unreasonable application of, clearly established Supreme Court law. *See* 28 U.S.C. § 2254(d)(1); *see also Strickland*, 466 U.S. at 687.

We construe appellant's additional arguments as a motion to expand the certificate of appealability. So construed, the motion is denied. *See* 9th Cir. R.

22-1(e); *see also* *Hiivala v. Wood*, 195 F.3d 1098, 1104-05 (9th Cir. 1999) (per curiam).

**AFFIRMED.**