

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 07 2010

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

DAVID P. GONZALEZ,

Petitioner - Appellant,

v.

G. J. GIURBINO, Warden,

Respondent - Appellee.

No. 07-55280

D.C. No. CV-06-02887-TJH

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, District Judge, Presiding

Submitted December 15, 2009**

Before: GOODWIN, WALLACE, and FISHER, Circuit Judges.

California state prisoner David P. Gonzalez appeals from the district court's judgment denying his 28 U.S.C. § 2254 habeas petition challenging his jury conviction for second degree murder. We have jurisdiction pursuant to 28 U.S.C.

* 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).

§ 2253, and we affirm.

Gonzalez contends that the prosecutor committed misconduct in closing argument by suggesting that defense counsel believed Gonzalez was guilty and arguing facts not in evidence. The California Court of Appeal's determination that there was no misconduct was not contrary to or an unreasonable application of federal law. *See* 28 U.S.C. § 2254(d). The prosecutor's comments on the defense's inconsistent theories of mistaken identity and self-defense and on the veracity of the key defense witness's testimony did not constitute misconduct. *See Tak Sun Tan v. Runnels*, 413 F.3d 1101, 1112 (9th Cir. 2005) (stating that under standards applicable to prosecutorial misconduct claims in habeas cases, first question is whether prosecutor's remarks were improper).

Gonzalez also contends that trial counsel was ineffective in failing to object to the prosecutor's statements. Because the prosecutor's statements did not constitute misconduct, trial counsel's failure to object did not constitute ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). *See Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005) (stating that trial counsel cannot have been ineffective in failing to raise a meritless objection).

AFFIRMED.