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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY LEON McCLAIN,

Petitioner - Appellant,

v.

DORA B. SCHRIRO; et al.,

Respondents - Appellees.

No. 08-15279

D.C. No. CV-07-00328-SRB

MEMORANDUM*

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

Submitted February 16, 2010**

Before: FERNANDEZ, GOULD, and M. SMITH, Circuit Judges.

Arizona state prisoner Anthony Leon McClain appeals from the district court's judgment dismissing his 28 U.S.C. § 2254 habeas 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 concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

McClain contends that his aggravated sentence violates the Sixth Amendment because the trial court relied on judge-found aggravating factors to sentence him above the presumptive sentencing range. As an initial matter, we reject the State's contention that McClain has failed to exhaust this claim. *See Scott v. Schriro*, 567 F.3d 573, 583 (9th Cir. 2009) (per curiam). Because the state trial judge relied on at least one permissible factor in enhancing McClain's sentence, the Arizona Supreme Court's decision rejecting this claim was neither contrary to, nor an unreasonable application of, clearly established federal law. *See* 28 U.S.C. § 2254(d)(1); *see also Butler v. Curry*, 528 F.3d 624, 643 (9th Cir. 2008).

AFFIRMED.