

APR 16 2010

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GUSTAVO McKENZIE,

Petitioner - Appellant,

v.

EDMUND G. BROWN, Jr., Warden,

Respondent - Appellee.

No. 07-56135

D.C. No. CV-05-02404-CJC

MEMORANDUM\*

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

Submitted April 5, 2010\*\*

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

California state prisoner Gustavo McKenzie appeals from the district court's order 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. P. 34(a)(2).

McKenzie contends that his right to a fair and impartial jury was violated when the prosecutor exercised a peremptory challenge to excuse an African-American juror. We review McKenzie's claim under *Batson v. Kentucky*, 467 U.S. 79 (1986), de novo because the state court's use of the standard laid out in *People v. Wheeler*, 22 Cal. 3d 258, 280 (1978), does not satisfy constitutional requirements. *See Wade v. Terhune*, 202 F.3d 1190, 1192 (9th Cir. 2000). McKenzie has failed to establish that the totality of relevant facts "gives rise to an inference" of purposeful discrimination by the prosecutor. *See Johnson v. California*, 545 U.S. 162, 168 (2005).

**AFFIRMED.**