

JUN 6 2011

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOFALO MATESE BROWN,

Petitioner - Appellant,

v.

JAMES D. HARTLEY, Warden,

Respondent - Appellee.

No. 09-17118

D.C. No. 2:09-cv-00216-FCD-
GGH

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Frank C. Damrell, Jr., District Judge, Presiding

Submitted May 24, 2011**

Before: PREGERSON, THOMAS, and PAEZ, Circuit Judges.

California state prisoner Sofalo Matese Brown appeals from the district court's denial of his 28 U.S.C. § 2254 habeas petition. We have jurisdiction under 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).

Brown contends that the state prosecutor in his criminal trial denied his constitutional rights to due process and a fair trial by intimidating a defense witness who chose not to testify.

The California Court of Appeal's determination that there was no prosecutorial misconduct was not contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court, and was not based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d); *Penry v. Johnson*, 532 U.S. 782, 792-93 (2001).

We construe the inclusion of an uncertified issue in the opening brief as a motion to expand the certificate of appealability. *See* 9th Cir. R. 22-1(e). So construed, the motion is denied. *See Hivala v. Wood*, 195 F.3d 1098, 1104-05 (9th Cir. 1999) (per curiam).

Kathleen C. Page's motion to withdraw as Brown's counsel is granted. We construe Brown's letter dated December 31, 2010, as a motion for appointment of new counsel, and deny the motion.

AFFIRMED.